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In The
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Delaware, in conflict with the rulings of other state courts of last resort, violates the Commerce Clause by permitting a State to tax 100 percent of more than $700 million of a taxpayer's gross receipts based solely on the fact that the goods were "physically delivered" into the State, even though almost all the taxed activity, including the sale of the goods themselves, occurred outside the taxing State.

2. Whether the Supreme Court of Delaware's treatment of the Delaware gross receipts tax as a transaction tax on the seller that only one State has the right to tax, rather than as a tax on income that must be apportioned, violates the Commerce Clause by permitting the taxation of sales that occur outside the State's borders.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company (Ford) respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Delaware.

OPINIONS BELOW

The opinion of the Supreme Court of Delaware (App., *infra*, 1a-18a) is reported at 963 A.2d 115 (2009). The decision of the Superior Court of Delaware (App., *infra*, 19a-52a) is unreported. The order of the Supreme Court of Delaware denying Ford's motion for rehearing *en banc* (App., *infra*, 53a) is unreported.

JURISDICTION

The Supreme Court of Delaware entered its judgment on December 8, 2008. Petitioner timely filed a motion for rehearing *en banc*. The Supreme Court of Delaware denied the motion for rehearing *en banc* on January 13, 2009. Justice Souter, on April 2, 2009, granted an extension of time within which to file a petition for a writ of *certiorari* to and including May 13, 2009.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the United States Constitution provides: "The Congress shall have Power * * * [t]o regulate Commerce * * * among the several States * * * ."

The relevant portions of the Delaware statutes are set forth at App., *infra,* 54a-60a.

INTRODUCTION

The questions presented address an issue of financial significance to every State and every business in the United States that sells goods at wholesale—*viz.*, the sale of goods for the purpose of resale by buyers (such as retailers)—in interstate commerce, as the decision below sustains an extraordinary extraterritorial application of a gross receipts tax by a State to capture gross receipts from sales that occur *outside* the taxing State.

Nearly 15 years ago this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), sought to end significant confusion in state courts concerning the constitutional limitations on the assessment of sales taxes and gross receipts taxes in interstate commerce. The Court held that sales taxes—taxes imposed on the *buyer* of goods and services—could be imposed only by the State in which the transaction occurred and thus did not need to be apportioned among the States where the value of

the goods or services was created. By contrast, the Court reiterated that gross receipts taxes—taxes on the *seller* of goods and services—are not transaction taxes. The Court held that these taxes are "simply a variety of tax on income, which [is] required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Id.* at 190.

Petitioner Ford Motor Company, one of the world's leading vehicle manufacturers and wholesalers, sold more than $700 million in vehicles at wholesale to independent dealerships in Delaware for resale to retail consumers during the less than four tax years at issue in this dispute. Due to a division among the state courts, however, how this $700 million in gross receipts will be treated for purposes of taxes levied on petitioner may vary State to State and city to city. Some state courts have held that the gross receipts must be apportioned amongst the various States where the economic activity underlying the gross receipts was earned. Other state courts, including the court below, have held that it does not matter whether out-of-state economic activities contributed to those sales, because only the State to which the vehicles are ultimately delivered can tax the gross receipts derived from the sales.

These divergent holdings in the state courts mean that several States claim the authority to tax the same transaction—at the point of sale, at the point of delivery, and in every other State where

activity generating a share of the gross receipts occurs. The risk of duplicative taxation is real, not speculative, in light of 1200 state and local gross receipts taxes currently in effect nationwide. *See* pages 23-25 *infra*.

Review is therefore necessary due to the sheer magnitude of financial harm that this conflict has caused and will continue to cause. This case alone involves more than $700 million of gross receipts derived from less than four years of sales of vehicles delivered to a State with a population of fewer than one million people. When multiplied to account for vehicles sold at wholesale to independent dealerships in all 50 States, the aggregate burden of this conflict to petitioner alone is staggering. The unresolved division in the state courts affects all businesses that sell goods or services in interstate commerce, as the conflicting rulings have already reached major automobile companies such as petitioner, leading wholesalers of household products such as Dial Corporation, the world's largest book and entertainment distributor Baker & Taylor, Inc., and the National Football League.

The time is right to resolve this division in the state courts, because the Nation cannot afford to allow these significant constitutional issues to percolate. In this period of severe economic uncertainty, businesses and States need clarity from this Court. States facing astounding drops in revenue need to know reliably what portions of a business's income they can constitutionally tax, and the Nation's

commerce as a whole needs the protections provided by the Commerce Clause against States that seek to aggressively expand their tax base to reach economic activity outside their borders.

STATEMENT OF THE CASE

A. Constitutional And Statutory Framework

1. For nearly a century, this Court has held that under the Commerce Clause, "a State may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)); *see also Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).[1] The activity a State seeks to tax thus must "actually reflect a reasonable sense of how much income is generated" in the taxing State. *Container Corp.*, 463 U.S. at 169. Under this fundamental Commerce Clause tenet, a state tax on a multistate business's income, *e.g.*, a tax on a *seller* of goods or services, must be fairly

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[1] This Court has articulated a four-part test to determine whether a state tax complies with the Commerce Clause requirements: the tax must (1) be applied to an activity with a substantial nexus with the taxing State, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the taxing State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This case implicates the fair apportionment prong of *Complete Auto*.

apportioned to reflect the various locations where the activities producing the income occur, so that a State does not tax the value of economic activity earned outside its borders. *Id.*

By contrast, a sales or use tax—*i.e.*, a transaction tax imposed on the *buyer* of goods or services—need not be apportioned at all. The State where the transaction occurs may impose a tax on the buyer "measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Jefferson Lines*, 514 U.S. at 186. Because a sale to a buyer is a "discrete event" that occurs in only one State, *id.*, there is no concern that another State could tax the buyer on the same transaction. *Id.* at 190.

2. Delaware imposes a gross receipts tax on any entity "engage[d] in the business in this State as a wholesaler." 30 Del. Code § 2902(b).

Delaware taxes wholesalers on the "*total consideration received* from sales of tangible personal property physically delivered within this State to the purchaser." *Id.* § 2901(4)(b) (emphasis added). That means Delaware taxes wholesalers on 100 percent of their gross receipts, regardless of how much of the value derived from the taxed gross receipts was earned from economic activity in other States so long as the goods eventually make their way through the stream of interstate commerce to rest in Delaware.

B. Factual Background

1. Petitioner Ford Motor Company is one of the leading automobile companies in the world. Petitioner is a Delaware corporation with its principal place of business in Dearborn, Michigan. Petitioner develops, manufactures, and sells vehicles throughout the United States and in many foreign countries.[2]

Ford does not sell vehicles directly to consumers. Rather, petitioner sells its vehicles, parts, and accessories at wholesale to independent dealers and distributors throughout the United States, including in Delaware. These dealerships, in turn, resell Ford's products to individual and corporate retail consumers. Del. S. Ct. App. A00123-124.

2. Ford's wholesale sales of vehicles to independent dealerships in Delaware cannot be described as isolated or separate transactions that occur in only one State; rather, Ford's wholesaling comprises a series of activities that take place in a number of different States. Del. S. Ct. App. A00105. These wholesaling activities include forecasting, regional allocation and marketing, and sales. The dealerships are economically responsible for the post-sale physical delivery to Delaware.

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[2] Petitioner and respondent entered into an extensive stipulation to eliminate any factual disputes. Del. S. Ct. App. A00101-117.

Forecasting. Ford's wholesaling process begins at its headquarters in Dearborn, Michigan, where marketing, sales, and purchasing employees forecast future vehicle sales and then allocate vehicles based upon those forecasts to each sales region. Del. S. Ct. App. A00104-105, A00166-167.

Regional allocation and marketing. Within each sales region, Ford's sales managers review allocations from corporate headquarters, project market conditions, and plan the most effective means for distributing to independent dealerships their share of the allocation. For the sales region that includes Delaware, Ford's district and regional managers are located in New Jersey and Virginia. Del. S. Ct. App. A00105, A00167-173. In marketing Ford's vehicles, petitioner's employees from those offices make approximately 60 visits to independent dealers in Delaware each year. These visits are the only wholesaling activity that petitioner conducts in Delaware. App., *infra,* 24a n.3.

Sales. All of the wholesale sales of petitioner's vehicles to the independent dealerships occur outside Delaware.

Title is transferred at an event known as the "gate release" at Ford's assembly plants in nine different States (Delaware not among them). There, a third party inspects and takes possession of the vehicle and drives it to a gate. At the gate, a barcode on the vehicle is scanned by Ford, the gate is raised,

and the vehicle passes through and is delivered to a common carrier. Del. S. Ct. App. A00108, A00124.

Gate release is where the sale of the vehicle occurs; petitioner at that point relinquishes legal title, ownership, risk of loss, and possession of the vehicle to the dealership. And at that moment, the vehicle is removed from Ford's inventory (and appears on the books and records of the independent dealership) and Ford recognizes income from the sale of the vehicle. Immediately after gate release, the independent dealership may sell the vehicle at retail, even before the vehicle physically makes its way through the stream of interstate commerce to the independent dealership in Delaware. As a result of that fact, no actual wholesale sales occurred within the State. Del. S. Ct. App. A00108.

Post-sale physical delivery. After gate release, the vehicles, now owned by the independent dealerships in Delaware, are transported via common carrier to a mixing center located in Fostoria, Ohio. From there the vehicles are shipped to destination ramps located in Jessup, Maryland and Twin Oaks, Pennsylvania, and thereafter to the independent dealerships located in Delaware. The independent dealerships reimburse petitioner for all costs of having the vehicles shipped to Delaware. Del. S. Ct. App. A00109.

C. Proceedings Below

1. From January 1999 to October 2002, petitioner paid a tax on 100 percent of the total gross receipts from its wholesale sales of vehicles—sales worth more than $700 million—to independent dealerships in Delaware.

Petitioner timely filed for a refund of the tax paid on that portion of gross receipts that exceeds the minimal economic activity Ford conducted in Delaware. Respondent Delaware Director of Revenue denied the refund request on May 6, 2003.

2. Petitioner sought review of that denial with the Delaware Tax Appeal Board. Prior to a ruling by the Board, petitioner removed the dispute to the Delaware Superior Court on February 11, 2004, pursuant to 30 Del. Code § 333. App., *infra*, 5a.

3. The superior court affirmed respondent's decision denying petitioner's refund. *Id.*; App., *infra*, 52a. The superior court held that "[e]ven if one were to view the wholesaling process to include the other activities initiated before the vehicles arrived in Delaware, those efforts are so intertwined with those which took place after that event, that they are incapable of segregation." App., *infra*, 46a. Petitioner appealed the superior court's decision.

4. The Supreme Court of Delaware affirmed.

The state supreme court upheld the gross receipts tax. Relying heavily on *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S.

232 (1987), the court held there was "no risk of impermissible multiple taxation" because the state tax "applies only to gross receipts from 'sales of tangible property *physically delivered within this State* to the purchaser or the purchaser's agent.'" App., *infra*, 14a (quoting 30 Del. Code § 2902(c)(1)). Rather than address the fact that the Constitution also permits the State where the actual sale occurred to impose the same tax, the court held that "physical delivery" is a "separate activity conducted wholly within this State," which "[o]nly Delaware has the jurisdiction to tax." App., *infra,* 15a (emphasis omitted).

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE STATE COURTS ARE SHARPLY DIVIDED OVER WHETHER A STATE MAY TAX 100 PERCENT OF GROSS RECEIPTS WHERE SIGNIFICANT ECONOMIC ACTIVITY GENERATING THOSE GROSS RECEIPTS OCCURS OUTSIDE THE TAXING STATE

Notwithstanding this Court's mandate in *Jefferson Lines* that gross receipts taxes are taxes on income and must be apportioned, state courts are in conflict over whether a State can tax 100 percent of the gross receipts regardless of where the economic activity that generated those receipts occurred.

A. The Decision Below Creates Further Confusion Over Whether A Gross Receipts Tax Must Be Apportioned That Will Not Be Resolved Absent This Court's Intervention

a. The decision below cannot be reconciled with the rulings of six other state courts.

Rather than concluding, like the court below, that a single situs—such as the location of "physical delivery" to the buyer or the location of a national sales office—confers the exclusive "jurisdiction to tax this separate activity conducted wholly within th[e] State," App., *infra*, 15a, the Supreme Court of Pennsylvania has held that "when considering the constitutionality of a gross receipts tax, it is the *activities* that generate those gross receipts that are determinative in an apportionment analysis," *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789, 805 (Pa. 2004) (emphasis added), *cert. denied*, 544 U.S. 962 (2005). The Pennsylvania court has explained that "it is only the receipts generated from the in-state component of the underlying activity that * * * may [be] properly tax[ed] under constitutional apportionment principles." *Id.*

The *Northwood Construction Corp.* decision followed a prior ruling of the Supreme Court of Pennsylvania, which also made clear that gross receipts taxes must be apportioned to reflect where the value being taxed was generated. *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823

A.2d 108 (Pa. 2003). That state court of last resort explained that "[h]istorically" this Court "has not required apportionment of gross receipts from activities involving manufacturing and sales" but that this Court has more recently "distanced itself from the gross receipts tax and sales tax analogy" under which States may tax the full value of the seller's gross receipts. *Id.* at 129-130. The Pennsylvania court thus held that *Jefferson Lines* rejected the contention that "gross receipts tax[es] * * * [are] wholly immune from the constitutional requirement of fair apportionment." *Id.* at 130. In its view, *Jefferson Lines* required the value of the taxpayer's gross media receipts attributable to its activities outside the State to be excluded from the taxing authority's gross receipts tax calculation. *Id.* at 133-134 (looking to "the source of the underlying activity that generated the media receipts").

The Supreme Court of Virginia in *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), likewise invalidated a gross receipts tax that was imposed on 100 percent of the revenues of a business because, "[g]iven the number of facilities and operations outside [the State], it is equally axiomatic that the value added to the product by the [in-State] operations could not possibly produce 100% of the revenues." *Id.* at 498.

And the Supreme Court of Colorado has explained, in *General Motors Corp. v. City & County of Denver*, 990 P.2d 59 (Colo. 1999) (en banc) that the

Constitution requires "an examination of 'the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.'" *Id.* at 71 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989)). Accordingly, the Colorado court stated that "[i]n the context of income taxes or taxes on gross receipts, apportionment must take into account the location where revenue is generated," while sales and use taxes on the buyer of goods and services do not require such apportionment. *Id.*

Other state appellate courts are in accord with these state supreme court rulings. The Arizona appellate court in *Southern Pacific Transportation Co. v. Arizona*, for example, has admonished that this Court "has made it clear that a sales tax that is paid in the taxing state on an interstate transaction need not be apportioned, but that an income, gross receipts, or privilege tax on such a transaction will violate the Commerce Clause in the absence of fair apportionment." 44 P.3d 1006, 1013 (Ariz. Ct. App. 2002); *see also Northwest Energetic Servs., LLC v. California Franchise Tax Bd.*, 71 Cal. Rptr. 3d 642 (Cal. Ct. App. 2008); *General Motors v. City of Kansas City*, No. WD 46246, 1994 WL 49620 (Mo. Ct. App. Feb. 22, 1994) (invalidating an unapportioned gross receipts tax on receipts from vehicle sales to dealers in the city), *vacated on other grounds*, 895 S.W.2d 59 (Mo. Ct. App.), *cert. denied*, 516 U.S. 909 (1995).

b. On the other side of the legal divide are the rulings of the supreme courts of Washington and Hawaii.

In *Ford Motor Co. v. City of Seattle*, a sharply divided Washington court (in a 5-to-4 decision) upheld a gross receipts tax on 100 percent of the wholesale sales of Ford within the taxing jurisdiction, and concluded that "[s]ales at wholesale * * * must be considered conducted entirely within the destination city" so that "no other state * * * can tax it." 156 P.3d 185, 194 (Wa. 2007) (en banc), *cert. denied*, 128 S. Ct. 1224 (2008). The decision, however, was strongly disputed by four members of that state court. The dissent explained that "[c]learly, Ford's wholesaling activities were not conducted wholly within Washington; its vehicles were sold in Michigan—title, ownership, and possession are transferred when Ford delivers the vehicles to a common carrier at its factory in Michigan," *id.* at 200 (Sanders, J., dissenting), which meant that the State was taxing the full value of transactions that other States had the right to tax, *id.* at 201.

The Supreme Court of Hawaii also mistakenly has held that, while "packaging, arrangements for delivery, and the actual loading of the products" can occur in other States and may be "crucial to the delivery of goods to consumers," these actions do not involve "any activity that creates taxable sales proceeds." *Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 816 (Haw. 2004). The court thus sustained the gross receipts tax on the grounds that the tax "only

taxes gross proceeds from the sale of goods made to people who are located in Hawaii." *Id.* at 816-817.

The Court should not allow this division among state courts to percolate any further, particularly at the cost of duplicative taxation on the same gross receipts by numerous States. The issues have been well-vetted by the state courts, and there is no indication that the divergent constitutional theories will be reconciled absent this Court's intervention.

B. The Delaware Court's Decision To Effectively Treat The Gross Receipts Tax As A Transaction Tax Rather Than As A Tax On Income Cannot Be Reconciled With The Precedent Of This Court

1. This Court's rulings require that gross receipts taxes be fairly apportioned to reflect where the taxed economic activity was earned rather than 100 percent allocated to where delivery occurs

a. The Delaware gross receipts tax should have been, but was not, analyzed as a tax on income, which must be apportioned to reflect where petitioner's wholesaling activities occurred. That result, as well as the identical results of the Washington and Hawaii Supreme Courts, *Ford*, 156 P.3d at 194; *Baker & Taylor*, 82 P.3d at 816, cannot be reconciled with *Jefferson Lines* and should be reviewed by this Court.

Rather than ensure that the state tax fairly "reflect[ed] the location of the various interstate

activities" where the gross receipts were earned, *Jefferson Lines*, 514 U.S. at 190, the court below acknowledged but ignored the significant out-of-state activities comprising petitioner's wholesale sales to which both Ford and the State had stipulated. This included sales forecasting, marketing strategy, advertising, and the transfer of title of vehicles, all of which occurred outside the State of Delaware in Michigan, New Jersey, Virginia, Georgia, Illinois, Kentucky, Minnesota, Missouri, and Ohio. *See* pages 7-9 *supra*. According to the court below, petitioner's out-of-state wholesaling activities were inconsequential to the Commerce Clause analysis. The court's "determinative factor" with respect to the constitutionality of the tax on petitioner's gross receipts was only the location where the vehicle is ultimately "physically delivered." App., *infra*, 6a (citation omitted).

By focusing on the discrete post-sale event of physical delivery, the Delaware court in effect treated its gross receipts tax, which must be fairly apportioned as a tax on income under *Jefferson Lines*, as a sales—*i.e.*, transaction—tax, which does not. But if that is to be the manner in which gross receipts taxes must be constitutionally analyzed—which would represent a sharp departure from *Jefferson Lines*, 514 U.S. at 190—such a result should come from this Court, not the Delaware court below.

b. Nor does *Tyler Pipe* permit the State to treat wholesale gross receipts taxes as transaction taxes under the Commerce Clause.

The court below was wrong when it concluded that "*Tyler Pipe* is squarely on point," App., *infra*, 14a, because the state tax "applies only to gross receipts from 'sales of tangible property *physically delivered within this State* to the purchaser or the purchaser's agent.'" *Id.* (quoting 30 Del. Code § 2902(c)(1)). The critical factor in *Tyler Pipe*, which is absent here, *see* pages 7-9 *supra*, was the fact that the wholesaling activity occurred wholly *within* that State.

The *Tyler Pipe* Court thus did not create an artificial construct dictating that all wholesaling activities, as a matter of constitutional law in all cases, occur at the situs of the sale rather than where the actual wholesaling activities occurred. The Court held that the wholesaling activities in *Tyler Pipe* were *exclusive* to Washington only because they were conducted by "in-state sales representative[s] engaged in substantial activities" within that State. 483 U.S. at 249.[3]

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[3] These *permanent* in-state sales representatives "maintain[ed] and improve[d] name recognition, market share, goodwill, and individual customer relations of Tyler Pipe," *Tyler Pipe*, 483 U.S. at 249 (citation omitted), and provided the taxpayer with "virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction projects; customer financial liability; and other critical information of a local nature." *Id.* at 250. Indeed, this Court in *Tyler Pipe* could cite to no out-of-state wholesaling activities, other than the fact that out-of-state executives "directed" the "solicitation of business" run by the in-state sales representatives. *Id.* at 249.

Accordingly, in *Tyler Pipe*, this Court rejected only the argument that an apportionment formula for a gross receipts tax on wholesaling must take into account the *manufacturing* activities of the taxpayer that occur outside the taxing State. *Id.* at 248-251. The Court explained that the taxpayer's out-of-state manufacturing activities could be ignored entirely because "the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Id.* at 251. Far from creating a categorical rule that wholesaling occurs exclusively in the State where the sale is made, *Tyler Pipe* rejected only the taxpayer's "erroneous assumption" that manufacturing and wholesaling together were a single "unitary activity," the receipts of which must be apportioned in the aggregate. *Id.*

In any event, *Tyler Pipe* must be read in conjunction with this Court's subsequent admonition in *Jefferson Lines* that gross receipts taxes must be apportioned to reflect the various locations where the gross receipts were earned. *Jefferson Lines*, 514 U.S. at 190. And it cannot be disputed, and was not disputed by the State, that petitioner's wholesaling activities were almost exclusively conducted in States other than Delaware. *See* pages 7-9 *supra*. The Delaware court, in fact, explicitly relied on petitioner's wholesaling activities conducted outside the State when it held that the gross receipts tax did not violate the Commerce Clause because petitioner

"caused deliveries to dealers in Delaware." App., *infra*, 17a. But the fact that the discrete event of delivery, not by petitioner but by the common carrier to the dealership, occurs in Delaware does not obviate the *Jefferson Lines* requirement that the tax be apportioned.

2. Even if the Delaware court properly treated its gross receipts tax as a transaction tax rather than as a tax on income, review is required because the State taxed out-of-state sales

Even if this Court were to discard nearly a century of Commerce Clause precedent and treat gross receipts taxes imposed on the *seller* of goods like transaction taxes—*e.g.*, sales taxes on the *buyer* of those goods—review would be required because the Delaware tax is based on where the delivery to the independent dealership occurs rather than where the sale occurs.

Under this Court's longstanding transaction tax precedent, in an interstate sale of tangible goods, the only State that may validly impose a sales tax is the State where title to the goods is transferred. This is true even where the purchaser contracts with the seller to have the goods delivered into the purchaser's home State after title is transferred. *Jefferson Lines*, 514 U.S. at 186-187 (only the State of "place of sale" may impose sales tax, "even where the parties to a sales contract specifically contemplated interstate

movement of the goods either immediately before, or after, the transfer of ownership"); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328-329 (1944) (where purchaser already obtained title to goods before delivery by common carrier into purchaser's State, purchaser's State may not tax transaction).

The State and the court below conceded that title to the vehicles that Ford sells at wholesale is transferred outside the taxing State at the point of "gate release" at the various manufacturing locations throughout nine other States. Indeed, the court explained that "Ford did not technically"—or otherwise—"own the vehicles following gate release" where title was transferred from Ford to the independent dealerships at Ford's assembly plants outside of Delaware. App., *infra*, 17a. Because gate release and title transfer never occur in Delaware (and thus Ford never actually sells any vehicles at wholesale within Delaware), the court's decision below sustained a transaction tax on the *seller* of goods that Delaware could not impose on the *buyer* of the very same goods.

Other state courts have sustained similar transaction-based gross receipts taxes applied to sales that actually occur outside the taxing State's borders. The Supreme Court of Washington focused on the fact that the goods were delivered to dealers in Washington and stated that "it d[id] not matter in which jurisdiction the actual sales at wholesale occur[red]." *Ford*, 156 P.3d at 190. As the dissenting members of that court explained, the State and cities

"reached two thousand miles beyond their borders to tax automobile sales made in Dearborn, Michigan." *Id.* at 197 (Sanders, J., dissenting). The Hawaii Supreme Court likewise rejected the argument that the State could impose a gross receipts tax only on "transactions made in Hawaii," *Baker & Taylor*, 82 P.3d at 808, reasoning that the sales were made to "people who are located in Hawaii" even though the transaction may have occurred in other States, *id.* at 816-817. *But see id.* at 816 (holding, in contradiction, that the "sales" create the gross proceeds rather than any interstate activity crucial to the sale).

Accordingly, irrespective of whether the Delaware tax is a tax on income (see pages 2-3, 16-17 *supra*) or a transaction tax, there can be no question that Delaware's gross receipts tax as applied to Ford violates the Commerce Clause by taxing extraterritorial income. By taxing 100 percent of the gross receipts of Ford's sales to Delaware dealerships, when nearly all of Ford's wholesaling activities and the sales themselves occur in other States, Delaware "reaches beyond that portion of value that is fairly attributable to economic activities within the taxing State." *Jefferson Lines*, 514 U.S. at 185. Delaware's allocation of 100 percent of these extraterritorial transactions to itself in no way "reflect[s] a reasonable sense of how income is generated." *Container Corp.*, 463 U.S. at 169. And, even assuming this Court were to abandon *Jefferson Lines* and treat gross receipts taxes like unapportioned transaction taxes, the court below and the Washington and

Hawaii courts have imposed their gross receipts taxes on sales that occurred outside their taxing jurisdiction, in violation of the "general principle [that] a State may not tax value earned outside its borders." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).[4]

C. The State Of Delaware's Unapportioned, Destination-Based Gross Receipts Tax Results In Multiple Taxation That Burdens Interstate Commerce In Violation Of The Commerce Clause

The Court should exercise its plenary review because the decision by the Delaware court permits Delaware to tax gross receipts from activity that is already taxed by other States.

This Court has required gross receipts taxes such as Delaware's to be fairly apportioned because, without such apportionment, a multistate business's income would be subject to significant duplicative taxation. Each State in which the company conducts commerce could seek to tax the same gross receipts. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 257 (1938).

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[4] The State seeks to evade this requirement by focusing on the fact that petitioner "caused" the vehicles to be delivered in Delaware. But that argument relies upon wholesaling activities that petitioner conducted outside the State.

The Commerce Clause is offended when one State's overreaching creates the "possibility" of duplicative taxation. *Jefferson Lines*, 514 U.S. at 184-185; *see also Armco Inc. v. Hardesty*, 467 U.S. 638, 644-645 (1984) (taxpayer need not "prove actual discriminatory impact" or else "the constitutionality of [one State's] tax laws would depend on the shifting complexities of the tax codes of 49 other states"). This is so because, even if other States declined to tax their apportioned share of petitioner's gross receipts from vehicles delivered to Delaware, that fact would not justify a decision by Delaware to extend its tax to the portion of those gross receipts that Delaware could not otherwise reach. *See Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948).

In this case, the "gate release" States of Georgia, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Jersey, Ohio, and Virginia—where Ford's sales to its Delaware dealers actually occur—may have a sufficient nexus with those transactions to tax them. *See Jefferson Lines*, 514 U.S. at 186-187; *Goldberg*, 488 U.S. at 263-264. Indeed, even if this Court were to adopt the Delaware court's transaction-based approach to gross receipts taxes, those States' rights to tax the sales are superior to any right of Delaware to tax them. *Cf. Jefferson Lines*, 514 U.S. at 194 ("primacy of taxes on sales" limits right of State to which goods are transferred after sale to impose use tax on transaction that has already been subjected to sales tax by State where transaction occurred).

D. Review Is Necessary Because The Decision Below Creates Significant Economic Uncertainty And Exposes Billions Of Dollars Worth Of Petitioner's Gross Receipts To Multiple Taxation

Absent this Court's intervention, significant uncertainty concerning the constitutionality of gross receipts taxes across the Nation will undermine business planning and investment at a time when our Nation, and our automobile industry in particular, can ill afford it.

Nearly 1200 States, counties, cities, towns, and other state political subdivisions[5] annually collect over $65 billion[6] in gross receipts taxes from businesses operating within their taxing jurisdictions. In the absence of clarity from this Court, these gross receipts taxes will be subject to inconsistent constitutional constructions and cause duplicative taxation, *see Central Greyhound*, 334 U.S. at 662-663, as States and localities seek to reduce their extensive deficits by expanding their tax bases to capture economic activity that occurs outside the taxing jurisdiction, and thus falls on those without an in-state political voice.

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[5] Ernst & Young, *State and Local Jurisdictions Imposing Income, Franchise, and Gross Receipts Taxes on Businesses* 1 (Mar. 7, 2007).

[6] Ernst & Young, *Total State and Local Business Taxes: 50 State Estimates For Fiscal Year 2008*, at 4 (Jan. 2009), *available at* www.cost.org/WorkArea/DownloadAsset.aspx?id=72320.

Nor are these gross receipts taxes limited to a small subset of businesses. The gross receipts taxes like those at issue here affect almost every business in the United States—from the National Football League in *Philadelphia Eagles*, 823 A.2d at 108; to the world's largest book and entertainment distributor in *Baker & Taylor, Inc.*, 82 P.3d at 804; to petitioner, one of the world's leading vehicle manufacturers and wholesalers. Indeed, on the very same day that the Supreme Court of Delaware ruled in this case, that court rejected an identical constitutional challenge to the Delaware gross receipts tax on behalf of the Dial Corporation, a leading seller of household products such as soap. *See Director of Revenue v. Dial Corp.*, 962 A.2d 916 (Del. 2008). Dial sold its goods at wholesale, to retailers such as Target, Wal-Mart, and others, and was required to pay gross receipts taxes on the full value of those gross receipts from Delaware sales, even though Dial conducted virtually no activity related to those wholesale sales within the taxing State except national advertising.

The stakes at issue in this dispute are far reaching. In less than four tax years, a State with a population of fewer than one million people sought (and was permitted by its own state court) to impose a gross receipts tax on more than $700 million of petitioner's sales. App., *infra*, 22a. When every State and local gross receipts tax is taken into account, every year, billions of dollars of petitioner's revenues are subject to these divergent, contradictory, and

ultimately duplicative gross receipts taxes. *See* pages 23-24 *supra*. Accordingly even as petitioner continues to weather the current financial storm, these attempts by States to make up for their own revenue shortfalls create another obstacle that petitioner must (unnecessarily and unconstitutionally) clear.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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MAY 13, 2009

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

FORD MOTOR COMPANY,	§	
	§	No. 257, 2008
Petitioner Below-Appellant,	§	Court Below: Superior
	§	Court of the State of
v.	§	Delaware in and for
DIRECTOR OF REVENUE	§	New Castle County
	§	
Respondent Below-Appellee.	§	C.A. No. 04C-02-155
	§	

Submitted: September 17, 2008
Decided: December 8, 2008

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

Upon appeal from the Superior Court. **AFFIRMED**.

Gordon W. Stewart, Esquire and Keith R. Sattesahn, Esquire of The Stewart Law Firm, Wilmington, Delaware; Of Counsel: Paul H. Frankel, Esquire (argued) and Irwin M. Slomka, Esquire of Morrison & Foerster LLP of New York City, New York for appellant.

John S. McDaniel, Esquire (argued) of the Department of Justice, Wilmington, Delaware for appellee.

RIDGELY, Justice:

Petitioner-Appellant Ford Motor Company ("Ford") appeals the judgment of the Superior Court affirming the determination by the Respondent-Appellee Director

of Revenue (the "Director") that the Director may lawfully impose an unapportioned tax on Ford's receipts from sales of motor vehicles sold to independent dealerships located in Delaware.

Ford makes four arguments on appeal. First, it contends that the Superior Court erred in holding that the Wholesalers' Gross Receipts Tax (the "Wholesalers' Tax") did not violate the Commerce Clause of the United States Constitution as applied to Ford's unapportioned gross receipts. Second, Ford contends that under the Superior Court's prior decision in *Dial Corp. v. Director of Revenue*,[1] the location of where title and ownership of the goods are transferred determines whether the Wholesalers' Tax is fairly apportioned with respect to receipts from those goods. Third, it contends that the Superior Court erred in holding that the wholesalers' tax law permits the taxation of receipts from sales of vehicles "physically delivered" outside Delaware. Fourth, it contends that it is entitled to pre-judgment interest on any refund of the Wholesalers' Tax. We find no merit in Ford's first three arguments, thereby rendering its fourth argument moot. Accordingly, we affirm.

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[1] 2008 WL 2058520 (Del. Super. Ct. Jan. 29, 2008) *rev'd* No. 257, 2008 (Del. Dec. – – 2008).

Factual Background

Ford is a Delaware corporation, headquartered in Michigan, that manufacturers and sells motor vehicles and motor vehicle parts. All of Ford's manufacturing activity takes place outside of Delaware.[2] Ford then sells its vehicles and parts to independent dealers for resale to retail customers. There are eleven dealerships located within Delaware which purchase Ford's vehicles along with related products and services.

Ford engages in several practices designed to boost its sales to the independent dealers. For each dealership, Ford develops a sales plan based on Ford's production and the dealer's expected needs. In addition, Ford District and Zone managers with offices in New Jersey and Virginia make frequent visits to dealers in Delaware to persuade these dealers to commit to buying certain models and quantities of Ford vehicles. Ford also enters into with each dealer a Sales and Service Agreement that imposes requirements on the dealers' conduct of business that are designed to enhance the Ford brand and increase sales of vehicles and parts. These requirements include certain sales practices and inventory guidelines, the performance of warranty and other service work on Ford vehicles, the display

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[2] The parties entered into an extensive stipulation concerning the factual circumstances upon which this litigation is premised.

of Ford signage, and the usage of Ford trademarks. Ford also engages in its own extensive nationwide advertising campaigns, sales, and promotional activities, in addition to contributing to the local dealers' advertising funds.

Generally, Ford delivers vehicles to the dealers by rail from the assembly plant to a "mixing center" for sorting, then by rail to "destination ramps" for further sorting, then by truck to dealers. A vehicle is assembled at one of eighteen assembly plants, all of which are located outside Delaware. Once assembled, it is moved to a drop zone, which is usually near the assembly plant. From there, an employee of one of the rail or motor carriers inspects and drives the vehicle through what is referred to as the "gate." It is at this point—termed "gate release"—that (the parties have stipulated) title to the vehicles passes from Ford to the dealers to which they are to be delivered. Additionally, gate release is the point at which revenue from the sale is attributed to Ford, the vehicle appears in the dealer's inventory, and the dealer has the right to sell the vehicle. Following gate release, vehicles destined for Delaware dealers travel to a mixing center in Ohio and then to destination ramps located in either Maryland or Pennsylvania.

Ford contracts with various rail and motor carriers to advance the vehicles along this logistical chain, ultimately leading to the purchasing dealer. Ford covers the cost of shipping and controls the arrangements made with the carriers. Ford also reimburses its dealers for any damage *in transitu* and

carries insurance to cover the cost of repair. In the infrequent event that the damage exceeds $500, Ford repurchases the vehicle from the dealer and either disposes of it or repairs it to be sold as a used vehicle.

Between January 1999 and October 2002, Ford paid a Delaware Wholesaler's Tax of $3,629,371 on sales of products that were shipped to locations in Delaware. Ford timely applied for a refund of the tax paid, which the Appellate Director of Revenue denied on May 6, 2003. Ford timely filed a protest of the denial with the Director under 30 *Del. C.* § 542, which the Director also denied. Ford then filed an administrative appeal which was removed to the Superior Court pursuant to 30 *Del. C.* § 333 on February 11, 2004. The Superior Court held a bench trial and issued an Opinion and Order affirming the Director's denial of Ford's claim, holding that there was substantial evidence to support the Director's conclusion that Ford was subject to the Wholesalers' Tax and that the Wholesalers' Tax, as applied to Ford, did not violate the Commerce Clause.[3] This appeal followed.

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[3] *Ford Motor Co. v. Dir. of Revenue*, 2008 WL 2058522, at *12 (Del. Super. Ct. Apr. 25, 2008)[.]

Standard of Review

We review a trial court's construction of a statute *de novo.*[4] We also review an administrative agency's interpretation of the law *de novo.* Factual findings of an administrative agency are reviewed to determine whether the findings of fact are supported by substantial evidence on the record.[5]

The Wholesalers' Tax requires any entity "engaged in business in this State as a wholesaler . . . " to pay a license fee and a tax on the "aggregate gross receipts attributable to sales of tangible personal property physically delivered within this State. . . ."[6] Gross receipts are defined as "total consideration received from sales of tangible personal property *physically delivered within this State to the purchaser or purchaser's agent. . . .*"[7] Under the statute, the determinative factor is the destination to which the seller delivers (or causes delivery by common carrier of) goods to the purchaser, either inside or outside Delaware, not the contractually agreed upon location of title passage.[8] Ford does not

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[4] *Acadia Brandywine Town Ctr., LLC v. New Castle County,* 879 A.2d 923, 925 (Del. 2005); *see also Lehman Bros. Bank, FSB v. State Bank Comm'r,* 937 A.2d 95, 102 (Del. 2007).

[5] *Lehman Bros. Bank,* 937 A.2d at 102; *State v. Worsham,* 638 A.2d 1104, 1106 (Del. 1994).

[6] 30 *Del. C.* 2902(b), (c)(1).

[7] 30 *Del. C.* § 2901(4)b.

[8] 30 *Del. C.* § 2901(7). "[T]he term 'physically delivered within this State' include[s] delivery to the United States mail or to

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contest that it is a wholesaler or that it receives consideration from the sale of goods ultimately delivered to customers in this State; instead it argues that the Wholesalers' Tax is unconstitutional.

The Commerce Clause Analysis

Ford contends that the Wholesalers' Tax, as applied to the proceeds of its sales where title to the product passes outside Delaware before being physically delivered to dealers in Delaware, violates Article I, § 8 of the United States Constitution (the "Commerce Clause").[9] Specifically, Ford argues the tax violates the "negative" or "dormant" aspect of the Commerce Clause that denies the States the power to exact more than their fair share from interstate commerce than would be commensurate with the burden imposed by that activity.[10]

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a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery.["] *Id.*

[9] U.S. CONST., art. I, § 8. It provides, in relevant part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . To regulate Commerce with foreign Nations, and among the several States. . . ." *Id.*

[10] *Or. Waste Sys. Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

In *Complete Auto Transit, Inc. v. Brady,*[11] the United States Supreme Court laid out a pragmatic approach for applying the dormant Commerce Clause to a state's taxation of interstate commerce. A state tax can be sustained against a Commerce Clause challenge where it: "(i) is applied to an activity with a substantial nexus with the taxing State, (ii) is fairly apportioned, (iii) does not discriminate against interstate commerce, and (iv) is fairly related to the services provided by the State."[12] The test is designed to ensure that those engaged in interstate commerce pay their fair share of the state tax burden.[13] On appeal, Ford does not contest the Superior Court's determination that the first and fourth requirements of the test are satisfied. At issue is whether the Wholesalers' Tax is fairly apportioned and whether it discriminates against interstate commerce.

The Wholesalers' Tax is Fairly Apportioned.

A fairly apportioned tax "ensure[s] that each State taxes only its fair share of an interstate transaction."[14] In order for a tax to be fairly apportioned, it must be apportioned in a way that is

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[11] 430 U.S. 274 (1977).

[12] *Id.* at 279 & 287.

[13] *Id.* at 288-89 [(]*overruling Spector Motor Serv. v. O'Connor,* 340 U.S. 602 (1951)); *see also Goldberg v. Sweet,* 488 U.S. 252, 260-61 (1989)[.]

[14] *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 184 (1995); *Goldberg,* 488 U.S. at 260-61.

both internally and externally consistent. "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. . . . External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[15] Ford has stipulated to the internal consistency of the Wholesalers' Tax.

A challenge on external consistency grounds must do more than show that the "apportionment formula . . . *may* result in taxation of some income that did not have its source in the taxing State. . . ."[16] Rather, the taxpayer must prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted in that State', or has 'led to a grossly distorted result.'"[17] In other words, the taxpayer must show that there is no rational relationship between the tax measure attributed to the state and the contribution of local business activity to the entire

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[15] *Jefferson Lines*, 514 U.S. at 185.

[16] *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978)).

[17] *Id.* at 170 (quoting *Moorman Mfg.*, 437 U.S. at 274).

value.[18] All that is required of the tax is that the apportionment formula dividing the tax base be reasonable.[19]

The United States Supreme Court has shied away from the extensive judicial lawmaking required to craft a single acceptable apportionment formula.[20] As a result, states are generally afforded wide latitude in determining how to divide the tax base to ensure that they tax only their fair share of interstate activity.[21] The Supreme Court has approved several methods, including: (1) a federal income tax computation based on a single-factor method using the proportion of the company's gross sales within the state;[22] and (2) a gross receipts tax imposed on the activity of wholesaling based on the proportion of gross wholesale proceeds from sales in the State.[23] The Court has recognized the inherent risk that this might result in some overlap in taxation, but

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[18] *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 380 (1991).

[19] *Lehman Bros. Bank*, 937 A.2d at 112.

[20] *Goldberg*, 488 U.S. at 261; *Moorman Mfg.*, 437 U.S. at 278[.]

[21] *Moorman Mfg.*, 437 U.S. at 274; *accord Jefferson Lines*, 514 U.S. at 195; *Goldberg*, 488 U.S. at 261; *Container Corp.*, 463 U.S. at 171; *Lehman Bros. Bank*, 937 A.2d at 112.

[22] *Moorman Mfg.*, 437 U.S. at 270-71.

[23] *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 251 (1987)[.]

has found this overlap to be not constitutionally significant.[24]

In *Moorman Manufacturing Co. v. Bair*,[25] the state of Iowa apportioned income for its state income tax by a ratio of Iowa destination sales to the taxpayer's total sales. In contrast, Illinois used a three-factor formula based on the ratios of property, payroll, and sales. The taxpayer argued that the Commerce Clause required the use of the three-factor formula to avoid multiple taxation. The Court held that the Iowa single factor method did not violate the Commerce Clause because the Commerce Clause did not forbid all overlap in taxation.[26] The Court further explained that, had Iowa imposed a gross receipts tax on Iowa destination sales—precisely the tax at issue here—the tax would be "plainly valid," even though such a tax would have been more burdensome than the net income tax at issue.[27]

In *Tyler Pipe Industries v. Washington State Department of Revenue*,[28] the United States Supreme

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[24] *Moorman Mfg.*, 437 U.S. at 278.

[25] 437 U.S. at 270.

[26] *Id.*

[27] *Id.* at 280-81 (citing *Std. Pressed Steel Co. v. Wash. Revenue Dep't*, 419 U.S. 560 (1975)).

[28] 483 U.S. at 251. The Washington tax at issue defined sales producing taxable gross receipts as "any transfer of the ownership of, title to, or possession of property for a valuable consideration." WASH. REV. CODE § 82.04.040(1). Since at least 1947, Washington has interpreted this statute as establishing a

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Court found a gross receipts tax analytically similar to Delaware's Wholesalers' Tax was fairly apportioned and passed constitutional muster. The appellant sought a refund of wholesale taxes it paid on goods that were manufactured outside of Washington but were shipped and sold to customers within the state. It argued that the tax did not fairly apportion the tax burden between the appellant's activities in Washington and its activities in other states. In upholding the tax, the Court explained:

> Washington taxes the full value of receipts from in-state wholesaling or manufacturing; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the . . . tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially

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destination test. *See Wash. Admin. Code* § 458-20-103 (1982) ("For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state."); TAX COMM'N OF THE STATE OF WASH., RULES RELATING TO THE REVENUE ACT R. 103 (1947).

> equivalent events in invalidating the multiple activities exemption. Thus, the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.[29]

In Delaware, the Superior Court has held that the Wholesalers' Tax is fairly apportioned and passes constitutional muster. In *Saudi Refining, Inc. v. Director of Revenue,*[30] the taxpayer shipped crude oil from outside Delaware via tankers to a refinery located in Delaware City. Title, custody, and risk of loss passed to the refinery at the first flange of the outer intake valve of the refinery. Although the title passed in Delaware, the Superior Court's decision regarding apportionment was based solely on the delivery requirement:

> Delaware seeks to tax only sales that are consummated by physical delivery within the state. This comports with the requirement that a state tax "only that portion of the revenues from interstate activity which reasonably reflect the in-state component of the activity being taxed."[31]

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[29] *Tyler Pipe*, 483 U.S. at 251 (citing *Moorman Mfg.*, 437 U.S. at 280-81; *Std. Pressed Steel,* 419 U.S. at 564 (holding wholesale gross receipts tax measured by gross proceeds of sales is "perfectly apportioned to the activities taxed")).

[30] 715 A.2d 89, 91-93 (Del. Super. Ct. 1998)[.]

[31] *Id.* at 97 (citing *Goldberg*, 488 U.S. at 262).

Relying on *Saudi Refining,* Ford contends that it does not physically deliver *any* vehicles to Delaware because title passes at gate release. However, this ignores the fact that Ford's customers contracted not just to purchase goods, but to have them delivered to a destination in Delaware as well. Although title and risk of loss pass to Ford's customers at gate release, Ford retains continuous and considerable control over the delivery process, stands in a contractual relationship with the carrier, is the named beneficiary on the cargo insurance, and takes responsibility for issues arising during delivery. Moreover, Ford dedicates a portion of its national advertising efforts to increasing its market share in Delaware.

Tyler Pipe is squarely on point. In that case, Washington required out-of-state manufacturers to pay a gross receipts tax on the sale of all goods delivered to buyers within the state, regardless of whether title to those goods passed to the buyer at some point outside the state. Delaware's Wholesalers' Tax, like the tax at issue in *Tyler Pipe,* poses no risk of impermissible multiple taxation—it applies only to gross receipts from "sales of tangible personal property *physically delivered within this State* to the purchaser or the purchaser's agent. . . ."[32] Ford contends that this definition permits states in which the vehicle[s] are delivered to the mixing areas and destination ramps to impose the same tax, but this

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[32] 30 *Del. C.* § 2902(c)(1) (emphasis added).

argument overlooks that the dealer is the purchaser and that *physical delivery* to the dealer occurs only in Delaware. Only Delaware has the jurisdiction to tax this separate activity conducted wholly within this State.[33] Therefore, as in *Tyler Pipe,* the Wholesalers' Tax is not "out of all appropriate proportion to the business transacted" in this state, nor is the result "grossly disproportionate."

The Wholesalers' Tax Does Not Discriminate Against Interstate Commerce

Ford contends that the Wholesalers' Tax discriminates against interstate commerce. A state may not discriminate against a taxpayer that conducts business in interstate commerce, by "providing a direct commercial advantage to local business."[34] A tax that unfairly apportions activity from other states discriminates against interstate commerce.[35]

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[33] Even if these other states imposed a tax on a different stage of the sale, there would be no impermissible taxation. *See Moorman Mfg.*, 437 U.S. at 278 n.13 (finding differing definitions of "sale" could lead to permissible level of multiple taxation); *see also Jefferson Lines,* 514 U.S. at 187-88 (finding Commerce Clause does not forbid the assessment of a succession of taxes by different States on distinct events as the same tangible object flows along).

[34] *Nw. States Portland Cement Co. v. Minn.,* 358 U.S. 450, 458 (1959).

[35] *Armco Inc. v. Hardesty,* 467 U.S. 638 (1984).

Ford argues that even assuming it conducted *all* of its wholesaling in Delaware and had the same gross receipts from sales to Delaware dealers, its wholesaler tax liability would remain unchanged. Ford claims this is discriminatory inasmuch as it is being penalized for conducting most of its wholesaling activities outside of the State. Ford also argues the tax is discriminatory because a Delaware wholesaler that sells vehicles only to out of state customers is subject to no tax at all.

Ford's argument lacks merit. As the Superior Court explained, the Wholesalers' Tax "treats any wholesaler engaged in wholesaling in Delaware the same. All must pay a tax on the gross receipts of the wholesaling activity without regard to where or how the goods were manufactured or assembled."[36] This is not discriminatory to interstate commerce, as it gives Delaware wholesalers no advantage over out-of-state wholesalers—both pay a tax on the gross receipts on goods physically delivered to customers in Delaware.

Dial Corp. v. Director of Revenue Does Not Affect the Outcome of This Appeal

Ford contends that the Superior Court's decision in *Dial Corp. v. Director of Revenue*,[37] compels a holding that Delaware cannot constitutionally tax

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[36] *Ford Motor Co.*, 2008 WL 2058522, at *32.

[37] 2008 WL 2058520 (Del. Super. Ct. Jan. 29, 2008), *rev'd* No. 257, 2008 (Del. Dec. – – 2008).

Ford's receipts from Delaware dealerships. *Dial* does not compel such a holding, for two reasons. First, our review of questions of law is *de novo*. Second, we have reversed today the Superior Court's decision in *Dial*.[38]

The Wholesalers' Tax Was Not Applied to Products "Physically Delivered" Outside Delaware

Ford claims that the Superior Court erred in holding that the Wholesalers' Tax permits taxation of receipts from sales of its vehicles "physically delivered" outside Delaware. Ford claims that none of its vehicles were physically delivered to Delaware as all were sent by common carrier to the mixing center in Ohio. This claim elevates form over substance. While Ford did not technically own the vehicles following gate release, it controlled their ultimate delivery in Delaware, reimbursed dealers for damage, and carried insurance for the cost of repair of any damage after gate release. While the gate release is [a] factor to be considered, as a practical matter, Ford caused deliveries to dealers in Delaware.[39] As applied to Ford, the Wholesalers' Tax did not violate the Commerce Clause of the United States Constitution.

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[38] *Dir. of Revenue v. Dial Corp.*, No. 109, 2008 (Del. Dec. – – 2008) (Order).

[39] Ford contends that it is entitled to pre-judgment interest on any refund of the Wholesalers' Tax. Because we find that Ford is not entitled to refund of the Wholesalers' Tax, we need not reach this issue.

Conclusion

The judgment of the Superior Court is **AFFIRMED**.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FORD MOTOR COMPANY,	:	
Petitioner,	:	C.A. No.
v.	:	04C-02-155 (CHT)
DIRECTOR OF REVENUE,	:	
Respondent.	:	

OPINION AND ORDER

On Appeal from the Decision of the Director of Revenue

Submitted: July 27, 2007
Decided: April 25, 2008

Gordon W. Stewart, Esquire, THE STEWART LAW FIRM 1007 N. Orange Street, Suite 1400, Wilmington, DE 19801, Paul H. Frankel, Esquire, Irwin M. Slomka, Esquire, MORRISON & FOERSTER, LLP, 1290 Avenue of the Americas, New York, NY 10104, Attorneys for Petitioner.

John S. McDaniel, III, Deputy Attorney General, Department of Justice, 8th Floor, Carvel State Office Building, 820 French Street Wilmington, DE 19899, Attorney for Respondent.

TOLIVER, JUDGE

PROCEDURAL POSTURE

Before the Court is an appeal by the Petitioner, the Ford Motor Company, of the decision of the Director of Revenue denying Ford's claims of entitlement to a refund of the wholesaler gross receipt tax paid pursuant to 30 Del. C. § 2902[1] in the amount of $3,629,376. The Director of Revenue denied the claim on May 6, 2003. Ford sought a review of that decision by the Delaware Tax Appeal Board. Following the response of the Director of Revenue, Ford removed the matter to this Court on February 11, 2004 pursuant to 30 Del. C. § 333.

A one day non-jury trial on the matter was held on June 28, 2005, followed by post trial briefing. On January 13, 2006, while this matter was pending, the Director of Revenue denied a similar claim by the Dial Corporation for a refund of the gross receipts tax paid by Dial pursuant to § 2902. Dial appealed and moved to have its case removed to this Court on an expedited basis to allow both to be addressed simultaneously.[2] That motion was granted on January 9, 2006. The briefing in the Dial appeal was completed and oral argument held on both cases on July 27, 2007.

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[1] This provision of the Code as well as all subsections thereof and related provisions of Chapter 29 shall hereinafter be referred to by section only.

[2] *Dial Corporation v. Director of Revenue*, C. A. No. 06C-05-014, at 2 (Del. Super. January 29, 2008).

While Ford and Dial essentially seek the same result and the legal issues are substantially the same, there are significant differences in the facts and legal arguments made. The Court has therefore addressed them individually and rendered a decision in the appeal by Dial on January 29, 2008.[3] That which follows is the Court's resolution of the issues so presented in the appeal by Ford.

STATEMENT OF FACTS

There is very little dispute of fact underlying this controversy.[4] The Ford Motor Company is principally engaged in the development, manufacture, assembly, marketing and sale of motor vehicles as well as motor vehicle parts. Although Ford is incorporated in the State of Delaware and pays the Delaware corporate franchise tax pursuant to 8 Del. C. § 503, its principal place of business is in Dearborn, Michigan.

Ford does not sell its products directly to consumers but to independent Ford dealerships. It is

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[3] *Id.* at 1. As the record reflects, the Court rejected the assessment made by the Director of Revenue on the goods sold by Dial to Wal-Mart for the reasons stated therein.

[4] As evidence of the absence of any significant dispute in this regard and to assist the Court in its review of the matters, the parties have entered into an extensive stipulation concerning the factual circumstances upon which this litigation is premised. Stipulation of Facts, *Ford Motor Co. v. Director of Revenue,* C.A. No. 04C-02-155 (Del. Super.) (filed June 28, 2005) (Docket No. 17).

considered a "wholesaler of goods" for purposes of § 2902. That statutory provision also mandates that any entity falling within that definition and engaged in the business of "wholesaling" must pay a licensing fee for each such facility located in Delaware as well as a tax on the gross receipts from all wholesale sales which take place within its borders.

From January 1999 until October 2002, Ford sold vehicles to automotive dealers in Delaware with a wholesale value of $727,440,438. Based upon that activity, Ford was assessed and paid gross receipt taxes imposed via § 2902 in the amount of $3,629,376. In December 2002, Ford filed a "Claim for Revision" with the Delaware Department of Finance seeking a refund of that amount.

Ford does not have a direct presence in this State, i.e., it does not maintain any offices, manufacturing/assembly plants or facilities of any kind in Delaware. Nor are any of its employees located or stationed here. The research, development, engineering and design activities associated with developing new and improved vehicles, takes place outside of Delaware. The nexus between Ford and Delaware lies in Ford's relationship with the eleven Ford and Lincoln Mercury dealerships located in Delaware which purchase Ford vehicles as well as related products and services. That relationship is governed generally by the Sales and Service Agreement which provides the basic framework through which the parties operate.

The delivery of a vehicle to a dealership in Delaware is the beginning of the end of a complex and detailed scheme. As noted above, no part of the Ford vehicles, beginning with the research, development, engineering or design associated with their production and/or assembly, takes place in Delaware. Notwithstanding that fact, the entire process must be described at least in basic terms in order to address whether § 2902 can be applied to the sale and delivery of the vehicles in question without offending any applicable legal principles.

The process leading up to the actual physical delivery of a Ford vehicle consists of several arguably separate activities. They are nominated as: (1) program forecasting, (2) allocation, (3) wholesaling, (4) scheduling, (5) segmenting, (6) sequencing/ blending, (7) vehicle building and (8) logistics. The first seven activities are relatively uncomplicated while the eighth, logistics, is more involved for present purposes.

Program forecasting along with the allocation process essentially involves a determination, based upon a dealer's past sales history and related information, of the number of vehicles to be distributed to that dealer for the upcoming year. This results in an "Earned Allocation Report" for each dealership which specifies the total number and type of vehicles for each dealership. The Ford employees involved in this function are located in Michigan.

During the wholesale process, Ford employees physically visit each Ford dealership in Delaware.[5] Those employees secure what is nominated as a "Dealer Commitment Form" signed by a representative of the dealership which obligates them to purchase a certain number of cars, at wholesale prices, from Ford.[6] The signed form is transmitted to Ford corporate headquarters in Michigan to be accepted by Ford. Ford then creates a "Suggested Retail Order" for the total number of vehicles committed to by the individual dealership which includes the specific information about each vehicle such as the make, model, color and options. Any orders subsequently drawn against that commitment are transmitted directly from Delaware to Michigan.

Once the orders are received, the remainder of the process prior to the logistics phase begins. This involves the assignment of orders to assembly plants based upon capacity, delivery costs and the time necessary to manufacture the vehicles involved after the component materials needed are gathered. The process is administered from Michigan although Ford proprietary software allows a dealer to track the

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[5] During the period at issue, Ford's employees made 58 visits per year to dealerships in Delaware for the purpose of securing wholesale sales.

[6] The Dealer Commitment Form is often modified in the two weeks after it is signed because not all dealerships commit to their full allocation and other dealers require more cars than their allocation.

manufacturing process until it is concluded. Once that point is reached, the vehicle is taken to a "drop zone" which is usually adjacent to the manufacturing facility where the vehicle was assembled.

The logistics phase begins once the vehicles are in the drop zone, and the employees of the assigned rail or motor carrier inspect and drive the vehicles through what is referred to as the "gate" or "gate release". It is at this point the parties have agreed that title to the vehicles, along with any associated risk of loss, passes from Ford to the dealers to which they are to be delivered.[7] In addition, it is at "gate-release" that revenue from the sale or sales in question is attributed to Ford based upon generally accepted accounting principles.[8]

Vehicles bound for Delaware are then transported to what is referred to as a "mixing center" in Fostoria, Ohio. From there, they are sent to a "destination ramp" in either Jessup, Maryland or Twin Oaks, Pennsylvania before being delivered to the designated dealers in Delaware. The costs of shipping the

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[7] The parties do not reference any evidence in the record upon which that agreement is based. But for their agreement in this regard, the Court, given the instant facts, might have reached a differen[t] result. In any event, for the reasons discussed *infra*, that agreement is not determinative of the legal viability of the gross receipts taxes assessed herein.

[8] In spite of this accounting maneuver, according to the Sales and Service Agreement, until payment from the dealer is actually received, Ford maintains a security interest in each individual vehicle.

vehicles, which includes both transportation and insurance, is borne by Ford. Ford also makes and controls the arrangements made with the carriers for shipping. The dealer apparently has no input or authority to make its own arrangements.

Upon arrival at the dealerships in Delaware, the vehicles are inspected by the dealer. If there is any damage to the vehicle that occurred during transport from the manufacturing facility to the dealership, Ford, not the dealer, pays the cost of the repair.[9] Before March 21, 2001, Ford would pay the cost of the repair directly. After March 21, 2001, insurance policies purchased by Ford insured all risk of loss not otherwise covered by the common carrier.[10] Ford is the loss payee of those policies.[11]

The relationship between Ford and the dealerships does not end once the vehicles arrive in Delaware. As opposed to that described in the Dial appeal, there are ongoing obligations flowing in both directions.

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[9] If the damage is greater than $500, the car cannot be sold as new. If that happens, Ford has two choices. It will either repair the vehicle and prepare it to be sold as used, or it can destroy the vehicle.

[10] The policies were issued by the American Road Insurance Company and the Gentle Winds Reinsurance, LTD. American Road is a subsidiary of Ford Motor Company and while Ford does not have a similar affiliation with Gentle Winds, Ford pays an annual premium for that policy of six million dollars.

[11] Each policy specifically covers the period of the vehicles transit from the manufacturing plant until it is accepted by the dealer.

In so far as the dealers are concerned, each must provide daily reports of all vehicles sold to the public, along with monthly and annual financial reports, to Ford in Michigan. The dealers must honor/perform all warranty, recall and service work as well as meet the standards prescribed by Ford when engaging in any such activity. Training to perform that work is provided by Ford customer service representatives at the dealerships. Any unresolved customer complaints must also be reported to Ford.

Ford's continuing commitment is just as substantial. The company directs national advertising to Delaware. Although the actual activities for advertising and marketing occur in Michigan, Ford contributes money directly into an advertising fund maintained by or on behalf of Ford dealerships in Delaware. Ford develops and initiates rebates and sales incentive programs implemented in Delaware designed to increase vehicle sales. Lastly, dealers must install and maintain signage identifying the dealer as being authorized to sell, lease and service new and used Ford vehicles. It is Ford which establishes standards for and must approve that signage.

Ford contends that the issue presented to this Court is whether imposing the Delaware Wholesaler Gross Receipt Tax on one hundred percent of Ford's gross receipts violates Article I, § 8 of the United States Constitution, also known as the "Commerce

Clause"[12] as well as the "Due Process Clause" of the Fourteenth Amendment to that document.[13] Ford argues that the tax is unconstitutional because it is applied to the sale of products which do not take place in the State of Delaware and places an undue burden upon interstate commerce.[14] As a consequence, the application of § 2902 has transgressed the limitations set forth in the Commerce Clause according to the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady,*[15] thereby constituting legal error.

Ford further argues that it should be completely exempt from taxation via § 2902 because it does not

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[12] It reads in relevant part:

> Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States. . . . [sic]

[13] It reads in relevant part:

> No State shall deprive any person of life, liberty, or property without due process of law.

[14] Ford further contends that a tax imposed under the statute might survive constitutional scrutiny if it were based upon some measure of its alleged presence in Delaware other than one hundred percent of Ford's wholesales of vehicles to Delaware dealers. It has suggested three alternate methods of calculating any gross receipts that might be due. Petitioner's Op. Br. at 10-11.

[15] *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

physically deliver tangible personal property within the geographical boundaries of the State of Delaware. Because Ford did not do so, its sales to Ford dealerships in Delaware do not fall within the ambit of the aforementioned statute. By reaching a contrary result given the existing circumstances, the Director of Revenue also erred as a matter of law.

The Director of Revenue urges the Court to affirm his decision. He argues that imposing the gross receipts tax via § 2902 generally and/or specifically in so far as Ford's vehicular sales activities in Delaware are concerned, does not violate any provision of the federal constitution as claimed by Ford.[16] The Director of Revenue goes on to contend that Ford does in fact deliver goods in this State within the meaning of § 2902. The Court, should, as a consequence, deny Ford's appeal and sustain the imposition of the taxes.

DISCUSSION

Scope of Review

As stated in *Dial,* the applicable standard of review is not complicated.

> The scope of review of the decision of the Tax Appeal Board upholding the decision of

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[16] In response to Ford's argument that there are alternative methods of assessing the tax, the Director of Revenue disagrees stating that the amount of the tax can not be assessed other than as set forth in the terms of the statute. Respondent's Post-Trial Ans. Br. at 33.

> the Director of Revenue is limited. The appeal to this Court does not involve a trial de novo; it is confined to a review of the proceedings below. The decision, if supported by the record, will be sustained in the absence of an abuse of discretion or an error law.[17]

The Commerce Clause

The purpose and history of the Commerce Clause is also set forth in *Dial.* At the risk of being repetitive, this Court acknowledged:

> The Commerce Clause of the United States Constitution gives Congress the power to regulate commerce among the several states. The framers of the Constitution intended, at least in part, to create an area of free trade among the several states; assure the unrestricted flow of commerce throughout the states; to protect commercial intercourse from invidious restraints and to prevent interference through conflicting or hostile state laws. It is also intended to prohibit one state from exacting more than its just share from interstate commerce than would be commensurate with the burden imposed by that activity. . . .[18]

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[17] *Dial,* C.A. No. 06C-05-014 at 9 (footnotes omitted).

[18] *Id.* at 10 (footnote omitted).

Complete Auto concerned a tax on automobiles delivered to dealers in the State of Mississippi. The vehicles were manufactured and/or assembled outside of that state. The tax was imposed for the privilege of doing business there. The amount of the tax was determined by application of the rates designated by statute to the gross proceeds of the sales or gross income received.

The Unite[d] States Supreme Court determined that the tax in question did not impose an undue burden on interstate commerce and upheld the imposition of the tax. That analysis has since become known as the *Complete Auto* four prong test. When applied, the test will result in the rejection of a challenge to a tax levied by a state or local government where the tax:

> [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.[19]

In 1995, the Supreme Court reaffirmed the *Complete Auto* analysis in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*[20] In that case, the interstate carrier did not collect Oklahoma sales tax on tickets

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[19] *Complete Auto Transit, Inc.*, 430 U.S. at 279.

[20] *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995).

for interstate travel originating in Oklahoma. The Oklahoma Tax Commission filed a claim with the United States Bankruptcy Court after the carrier went bankrupt. The Bankruptcy Court found the tax inconsistent with the Commerce Clause in that it placed an undue burden on interstate commerce and presented a danger of multiple taxation of the same activities. The Supreme Court disagreed based upon its analysis of the situation in light of the holding in *Complete Auto.*

There was no real dispute between the parties in *Jefferson Lines* as to prongs one, three and four of the *Complete Auto* test. However, it was a different story relative to the fair apportionment prong. The tax had to be both internally and externally consistent.

> . . . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. . . . The test . . . looks to the structure of the tax at issue to see whether its identical application by every State . . . would place interstate commerce at a disadvantage as compared with commerce intrastate. . . .
>
> External consistency, on the other hand, looks not to the logical consequences of cloning, but the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly

> attributable to economic activity within[ ] the taxing State.[21]

The Supreme Court made a number of additional comments which, while not critical to its decision, are particularly relevant to the instant controversy. It stated:

> . . . [W]e found a sufficient safeguard against the risk of impermissible multiple taxation of a sale in the fact that it was consummated in only one State. . . . As we put it [previously], a necessary condition for imposing the tax was the occurrence of 'a local activity, delivery of goods within the State upon their purchase for consumption'. . . . Conversely, we held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier. The out-of-state seller in that case 'was through selling' outside the taxing State. . . .[22]

The Court further noted that while some of the activities taking place before or after a sale or rendition of services might cross state lines, multiple taxation of the same goods and/or services was not prohibited by the Commerce Clause.[23] Lastly, it

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[21] *Id.* at 185.

[22] *Id* at 187.

[23] *Id.* at 188-189. *See also City of Modesto v. National Med. Inc.*, 27 Cal. Rptr.3d 215. (Cal. App. 2005).

recognized that case law supported the proposition that:

> . . . [S]ales with at least partial performance in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller.[24]

The decision and underlying rationales of *Complete Auto* and *Jefferson Lines* have been the subject of much discussion since issued generally and in particular here. Several consistent conclusions regarding the taxation of interstate commerce have resulted. They are as follows:

> 1. Taxing interstate commerce is not prohibited by the Commerce Clause and interstate commerce must bear its fair share of the state and local tax burdens to which it contributes.[25]
>
> 2. Gross receipts taxes are a means of distributing the costs of government and not a measure of the benefits actually conferred by state and/or local governments.[26]
>
> 3. Any taxes so imposed must be reasonably related to the extent of the contact with or presence within the taxing

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[24] *Jefferson Lines, Inc.*, 514 U.S. at 189.

[25] *Id.*

[26] *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980).

> jurisdiction since this is the primary justification for such taxes.[27]
>
> 4. Manufacturing and wholesaling are different activities for purposes of determining whether a state or local tax places an impermissible burden [on] interstate commerce thereby violating the Commerce Clause.[28]

It is within this framework that the dispute between Ford and Director of Revenue must be addressed. The Court will turn first to the issue of whether Ford's wholesaling efforts are subject to § 2902. If the answer is in the affirmative, the focus must shift to an examination of whether § 2902 was applied in a fashion consistent with the Commerce Clause.

Ford's Activities Fall Within The Ambit of § 2902

The instant controversy centers, as noted above, around whether Ford was engaged in "wholesaling" during the course of the activities in question. The answer requires a further review of the relevant statutory provisions of Chapter 29.

Section 2901(10)(a)(1) defines a "wholesaler" as follows:

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[27] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

[28] *Tyler Pipe Industries v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987).

> Every person engaged, as owner or agent, in the business of selling to or exchanging with another person goods for cash or barter or any consideration for purpose of resale by the person acquiring the goods sold or exchanged, and includes without limitation goods sold or exchanged through outlets, warehouses and distribution depots of persons whose principal place of business is located inside or outside this State and also includes the sale of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity is subject to the tax imposed by this part. . . .

The parties agree that Ford falls within this definition and that the statute requires any entity falling within that definition to pay a fee or a tax at the statutorily mandated rate applied to the "aggregate gross receipts attributable to sales of tangible personal property physically delivered within this State. . . ."[29] Section 2902(4)b defines "Gross receipts" where a wholesaler is concerned as the "total consideration received from sales of tangible personal property physically delivered within this State to the purchaser or the purchaser's agent" with certain exceptions not pertinent to this discussion. Lastly, "physically delivered" in this context includes:

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[29] Section 2902(b) & (c)(1).

> [D]elivery to the United States mail or to a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery.[30]

As noted above, Ford contends that since title to the vehicles is transferred to the dealerships before the vehicles enter Delaware, the activities in question do not fall within the scope of Chapter 29 and should not be taxed. This argument is not persuasive.

Simply put, Ford does maintain a continuous course of contact with and control over the delivery and wholesale sale of Ford vehicles and related products/services to dealerships located in the State of Delaware. Moreover, the wholesaling process begins with and is superimposed upon activity taking place in Delaware. As a result, the Court must conclude that said activity is governed by § 2902. That conclusion is warranted for at least three reasons.

First, the record clearly indicates that Ford has an ongoing relationship with the eleven Ford and Lincoln/Mercury dealerships located in Delaware which preexisted the assessment of the taxes in question. That relationship, as evidenced by the Sales and Service Agreements, defines how, when and where Ford vehicles and related services are acquired as well as disposed. The initial forecast of the number of vehicles to be sold along with the agreement to

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[30] Section 2901(7).

purchase the same involved physical visits to and contacts with the Delaware dealerships by Ford employees from other states and the execution of a dealer commitment form in Delaware. It involves as well the transmission of orders placed pursuant to those agreements by dealership personnel in Delaware to Ford headquarters in Michigan.

Second, Ford determines and controls the manner as well as the timing of the delivery of vehicles, other Ford products and related services to the dealerships.[31] Although the parties have agreed that title and risk of loss pass to the dealerships outside Delaware, it is apparent that Ford's contact with, control over and interest in the vehicles does not end at that point.

Ford schedules and directs delivery to Delaware by carrier which is critical to the wholesaling process, at least according to Ford's expert, Douglas Kevorkian.[32] Ford retains an ownership interest in the vehicles in the form of a lien until the price of each vehicle is actually remitted to Ford which is most likely after the vehicle is sold.[33] The Court

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[31] This is to be contrasted with the situation in *Dial* where Wal-Mart told Dial where and when to deliver the goods Wal-Mart purchased from Dial.

[32] *See* Stipulated Ex. N. 7, Douglas Kevorkian, *Wholesale Practices of Ford Motor Company and the US Auto Industry*, at 47 (January 25, 2005).

[33] While "title transfer" may allow dealerships to dispose of the vehicles, any vehicles so shipped, like a mortgaged home,

(Continued on following page)

further notes that vehicles sustaining more than $500 in damage during transit are returned to Ford for disposition by Ford, including, but not limited to resale.

Third, Ford controls the manner in which dealerships dispose of or maintain vehicles delivered to them by carrier. Ford mandated the terms and circumstances by which the dealerships advertise and/or display Ford products.[34] Similarly, Ford sets the standards for service, repair and warranty work on vehicles acquired by Delaware dealerships from Ford and sends Ford employees to Delaware to train dealership personnel in those regards. That oversight continues up to and including that point in time that the vehicles are sold in the reports that the dealerships must make to Ford concerning sales of vehicles and products along with the performance of related services.

To reach any other result would be to ignore the complex relationship between Ford and its Delaware dealerships. That relationship as well as the activities generated are not capable of simplistic division as Ford would argue but are inextricably intertwined constituting one continuous course of conduct. The

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remain encumbered unless and until the lien is released by Ford.

[34] The record further reflects that Ford provides incentives which affect the price and/or terms of the sale of the vehicles by the dealerships to consumers post delivery.

activity assessed was intended by Ford to culminate in the delivery of vehicles in Delaware, which did take place. As a consequence, Ford's wholesaling activities are within the scope of § 2902 and subject to the fees assessed thereby. If Ford's challenge is to be successful, it must be based upon the applicable provisions of the United States Constitution.

Constitutionality of § 2902

The constitutionality of gross receipts taxes when viewed in light of the Commerce Clause has long been settled.[35] Again, the Commerce Clause does not prevent taxation of interstate commerce by state or local governments as long as the governmental effort in that regard imposes no undue burden upon that commerce. Moreover, there is no challenge via the Due Process Clause of the Fourteenth Amendment where there is a substantial nexus for Commerce Clause purposes between the activity being taxed and the taxing jurisdiction.[36]

Section 2902 is not constitutionally suspect on either ground. First, Ford does not dispute the fact

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[35] *Complete Auto Transit, Inc.*, 430 U.S. at 274; *Jefferson Lines, Inc.*, 514 U.S. at 175; *Franklin Fibre-Lamitex Corp. v. Director of Revenue*, 505 A.2d 1296, 1299 (Del. Super. 1985), *aff'd* 511 A.2d 385 (Del. 1986). As to *Franklin Fibre*, the Court must note, as it did in *Dial*, that the case is of no additional utility here given the amendment of § 2902 in 1984. *See Dial*, at 19.

[36] *Complete Auto Transit, Inc.*, 430 U.S. at 274.

that there is a substantial nexus between its wholesaling activities and Delaware. Its due process claim does not, as a consequence, merit further consideration.[37] Second, Ford's challenge lies in the application and/or assessment of the tax on the sales between Ford and its Delaware dealerships. It contends that said assessments place a constitutionally impermissible burden upon interstate commerce based upon the dictates of *Complete Auto* and its progeny. To be specific, Ford contends that the taxes imposed via § 2902 are not fairly apportioned, are not fairly related to services provided and that the taxes discriminate against interstate commerce, thereby failing three of the four prongs of the *Complete Auto* test.[38] The constitutionality of the assessments made by the Director of Revenue will be so judged as a result.

Complete Auto Analysis

Ford contends that the assessments violate the third prong of the *Complete Auto* test in that they discriminate against interstate commerce in favor of intrastate commerce. That argument has no merit. The statute treats any wholesaler engaged in

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[37] Indeed, Ford has devoted a total of two paragraphs in its opening brief and nothing after that.

[38] As noted above, Ford does not argue that there is no substantial nexus between the activity being taxed and the taxing jurisdiction and does not therefore suggest that the instant assessments violate the first prong of *Complete Auto*.

wholesaling in Delaware the same. All must pay a tax on the gross receipts of the wholesaling activity without regard to where or how the goods were manufactured or assembled. It is the extent of the wholesaling activity which is measured by the receipts from the sales of the goods delivered in Delaware which is taxed.

Ford's argument is apparently premised upon defining wholesaling to include the manufacturing of the goods.[39] The Court does not adopt that definition as the activities comprise two distinct events which may be taxed separately as the goods transit the stream of commerce.[40] Ford's expert testimony does not negate the legal viability of that conclusion and is not persuasive given the facts and circumstances of this litigation.

Ford next contends the taxes imposed run afoul of the fourth prong of the *Complete Auto* test in that they are not fairly related to benefits conferred upon

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[39] The examples provided by Ford in support of its argument are not helpful. Every wholesaler, regardless of where they manufacture or assemble the goods being wholesaled, is taxed at the same rate. General Motors and Chrysler, both of which have assembly facilities in Delaware, would pay the same rate as Ford or Toyota on vehicles delivered to dealerships in Delaware. Consequently, the location of efforts to create the finished product leading up to their delivery, is of no consequence when the gross receipts tax is assessed pursuant to § 2902. Petitioner's Op. Br. at 19.

[40] *Complete Auto Transit, Inc.*, 430 U.S. at 274; *Tyler Pipe Industries, Inc.*, 483 U.S. at 243.

the taxpayer by the taxing jurisdiction. To adopt Ford's argument in this regard, the Court would have to accept the proposition that Ford's activity is limited to averaging fifty-eight visits to Delaware per year by four of its employees. That is simply incorrect and represents an extremely myopic view of Ford's wholesaling activity in Delaware.

As previously described, Ford's presence and/or wholesaling activity in Delaware is substantial. It involves extensive and ongoing contact with the dealerships, the execution of contracts and orders for motor vehicles along with advertising and continued financial interests in those goods post delivery to Delaware. Ford sends employees to Delaware to train dealership staff in a continuing effort to sell, service and/or repair vehicles after the vehicles had been delivered here. Most significantly, Ford directs, schedules and otherwise controls the delivery of vehicles to its dealerships in Delaware.

In order to satisfy the fourth prong of the *Complete Auto* test, there need not be a dollar for dollar relationship between the amount of tax imposed by the jurisdiction and the value of the benefits conferred to the taxpayer.[41] Nor does there have to be a direct benefit conferred upon the taxpayer before the taxpayer is made to pay it[s] share

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[41] *Commonwealth Edison Co.*, 453 U.S. at 628-629.

of the expenses of government.[42] All that is required is that the taxpayer bear its fair share of state expenses and that the measure of those expenses must be reasonably related to the level of its activity in the taxing jurisdiction.[43]

During the period of time under scrutiny, Ford received in excess of $700,000,000 from the sale of vehicles delivered to dealerships in Delaware. Based upon that activity, it paid approximately $3,700,000 in gross receipts taxes via § 2902. Given the level of activity involved along with the amount of revenue so generated, Ford cannot enjoy the privilege of doing business in this State without paying its fair share of the costs of government associated therewith. Stated differently, the Court is not persuaded by Ford's argument in this regard and must conclude that the tax is fairly related to the benefits conferred by and in this State.

The major thrust of Ford's challenge is that the gross receipts tax assessed violates the second or fair apportionment prong of the *Complete Auto* test. Ford claims that since "less that one quarter of one percent of Ford's costs associated with its gross receipts from Delaware dealers are from activities conducted in

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[42] *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Jefferson Lines, Inc.*, 514 U.S. at 175.

[43] *Commonwealth Edison Co.*, 453 U.S. at 626; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

Delaware",[44] taxing one hundred percent of the gross receipts from the sale of vehicles delivered to dealerships in Delaware contravenes the aforementioned measure of constitutionality. It again relies upon the view that Ford's only activities in Delaware are the visits by its New Jersey and Virginia sales managers. The Director of Revenue, Ford argues, has erroneously taxed substantial wholesaling, development, manufacturing assembly and marketing activities that took place beyond the borders of Delaware.

Neither side disagrees with the proposition that the tax imposed must be internally and externally consistent. Nor have the parties advanced any argument suggesting that the tax is inconsistent internally. Ford's argument is that the challenged assessments are externally inconsistent, i.e., the taxes reach activities beyond Delaware. This argument, however and again, requires the Court to adopt a view of the definition of wholesaling put forth by Ford. It also requires the Court to ignore: (1) the full scope and nature of Ford's activities associated with the sale and delivery of its products in Delaware; and (2) the fact that each of those activities is inextricably intertwined with the other activities and done to benefit Ford's wholesaling efforts in Delaware. This Court, at the risk of being repetitive, cannot adopt such an approach.

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[44] Petitioner's Op. Br. at 18.

First, the Court must conclude that the tax was assessed based on the delivery of vehicles in Delaware and therefore, on activities which took place in Delaware. As a result, there is no risk of multiple taxation by other jurisdictions on goods so delivered. The Director of Revenue has not attempted to tax more than Delaware's fair share of this interstate commerce and the tax is reasonably related to Ford's presence in this State.

Second, with respect to Ford's argument that wholesaling includes other activities leading up to the completion of the finished product which took place prior to delivery to Delaware, this Court repeats the response made relative to the fourth prong.[45] In sum, wholesaling is a separate and distinct activity which took place locally. In addition, it is clear that goods may be taxed at more than one point in the stream of commerce for different reasons.[46]

Third, the tax imposed via § 2902 is a tax based upon the privilege of doing business in this State and the level of activity in that regard. Even if one were to view the wholesaling process to include the other activities initiated before the vehicles arrived in Delaware, those efforts are so intertwined with those which took place after that event, that they are incapable of segregation. Moreover, Ford's efforts were intentionally designed and carried out for

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[45] *See* p. 33-36 *supra*.

[46] *See* cases cited at foot note 23 *supra*.

purposes of engaging in wholesaling in Delaware. As a consequence, it was appropriate for the Director of Revenue to view that activity as having taken place entirely in this State here as a measure of that business activity. This view is consistent with the dictates expressed in *Jefferson Lines.*[47]

Ford cites a number of cases meant to bolster its position that the gross receipts tax as applied by Delaware is unconstitutional because the tax is not fairly apportioned.[48] However, the cases so referenced are either factually inapposite or legally irrelevant.[49] For example, neither *Northwood Construction Co. v. Township of Upper Moreland; City of Winchester v. American Woodmark Corp.*; nor *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia,* upon which Ford places significant reliance, present fact patterns which are even remotely analogous to the facts presented here. The taxation challenged in those cases as violative of the Commerce Clause

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[47] *Id.*

[48] *See* Petitioner's Op. Br. [a]t 15-20.

[49] *See generally Northwood Construction Co. v. Township of Upper Moreland,* 856 A.2d 789 (Pa. 2004), *cert. denied,* 125 S. Ct. 1736 (2005); *City of Winchester v. American Woodmark Corp.,* 464 S.E.2d 148 (Va. 1996); *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia,* 823 A.2d 108 (Pa. 2003); *General Motors Corp. v. City of Los Angeles,* 486 P.2d 163 (Cal. 1971); *General Motors Corp. v. City of Kansas City,* 1994 WL 49620 (Mo. App. W.D. Feb. 22, 1994). *M & Assocs. v. City of Irondale,* 723 So.2d 592 (Ala. 1998); *Southern Pacific Transportation Co. v. Arizona Department of Revenue,* 44 P.3d 1006 (Ariz. Ct. App. 2002).

attempted to include activities without any connection to the taxing jurisdiction. That is clearly not the case here.

As noted in *Dial,* it is the application of the *Complete Auto* test to the specific facts of each case which determines whether the application of the taxing authority, or the authority itself, is constitutional. Ford is correct to the extent that it argues that there are cases where gross receipts taxes have been deemed unconstitutional because they do not conform to the standard outlined by the *Complete Auto* test. However, the mere existence of this line of jurisprudence, without more, is not persuasive.[50]

Given this view of Ford's activities, the Court must conclude that the imposition of the gross receipts tax is externally consistent as well as internally consistent. Section 2902 does not reach activities or efforts beyond the borders of Delaware and is fairly apportioned under the instant circumstances as a result. Nothing more in this regard is required by the Commerce Clause.

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[50] More on point are *General Motors Corp. v. City of Seattle,* 25 P.3d 1022 (Wash Ct. App. 2001), *cert. denied,* 535 U.S. 1056 (2002) and *Volkswagen Pac., Inc. V. City of Los Angeles,* 496 P.2d 1237 (Cal. 1972) where the gross receipts taxes imposed on wholesaling in each case are deemed to have been fairly apportioned given the separate and distinct nature of manufacturing versus wholesaling as differentiated by the U.S. Supreme Court in *Tyler Pipe Industries,* 483 U.S. at 234.

In sum, the imposition of the gross receipts tax pursuant to § 2902 meets all four prongs of the *Complete Auto* test. This view is consistent with the holdings not only in *Complete Auto* but in *Jefferson Lines, Tyler Pipe* and other cases reviewing the interaction between state/local tax statutes and the Commerce Clause. Accordingly, the Court must find that the Director of Revenue did not run afoul of the Commerce Clause. The fact that some of the activities contributing to production of the goods upon which the assessment was based took place in other states is of no legal consequence and does not require the Director of Revenue to exclude any part of the value of the goods sold at wholesale by Ford in Delaware.[51]

This is not the first occasion that Ford has attempted to persuade a court that the Commerce Clause insulates Ford's wholesaling activities from taxation by a state or local jurisdiction. In *Ford Motor*

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[51] The conclusion that the taxes imposed via § 2902 does not violate the Commerce Clause is also consistent with the result reached by the Court in *Dial*. As that decision reveals, all aspects of the relationship between Dial and Wal-Mart from beginning to end took place prior to the delivery of the goods in Delaware. Dial had completed the sale and had no further connection or contact with the goods. Passage of title and transfer of the risk of loss occurred outside of this State and was critical to determining whether the tax was assessed in a manner that did not constitute an undue burden upon interstate commerce. In the instant litigation, there was extensive and continued contact with Delaware with the clear purpose of facilitating wholesaling activity notwithstanding when and where legal ownership was to have passed.

Co. v. City of Seattle, Executive Servs. Dep't,[52] Ford advanced the same arguments supported by the same line of authority that it has championed here. The issue arose following imposition of a "business and occupation tax" by the Cities of Seattle and Tacoma, Washington on wholesale sales by Ford to automotive dealers in those cities.

Ford was registered to do business in the State of Washington, and while it maintained an office in Bellevue, Washington, Ford did not manufacture or assemble motor vehicles in that state. Nor did Ford sell automotive products directly to consumers. However, as the Supreme Court of Washington noted, Ford did sell vehicles and parts to dealers who in turn sold them to consumers. Ford also engaged in a wide variety of activities within the two cities for the purpose of selling its products to dealers and assisting the dealers in selling Ford products/services directly to consumers. That effort included advertising, marketing, meeting with dealership personnel about new products and services, selling automotive warranties on Ford automobiles as well as addressing customer concerns.

After referencing the federal authorities discussed above, the Washington Supreme Court went on to conclude that the tax in question was fairly apportioned, did not discriminate against interstate commerce and was fairly related to the

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[52] 156 P.3d 185 (Wash. 2007).

services provided by the taxing jurisdiction. Therefore, the tax did not violate the constraints imposed by the Commerce Clause.[53]

That court also made several comments about the challenges raised by Ford. First, it noted that Ford's fair apportionment argument had been previously decided adversely to Ford and there was no basis to alter that result. Second, wholesale sales constituted an activity separate from manufacturing, design and related activities and must be considered as having been conducted totally within the locale where the goods ultimately came to rest.[54] Lastly, the court dismissed Ford's assertion that the *Complete Auto* analysis required it to "compare the actual value of the services provided by the [taxing jurisdiction] with the income taxed."[55] Rather, the court stated that the fourth prong of the *Complete Auto* test did not concern the rate or amount of the tax but required only that the tax be "tied to the earnings which the state made possible."[56]

The holding and comments made in *Ford v. City of Seattle* referenced above to the instant litigation

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[53] Ford did not challenge the existence of the first or substantial nexus prong of the *Complete Auto* test. In addition, there were challenges not relevant to this litigation raised by Ford based on state law which were also rejected by the Washington Supreme Court.

[54] *City of Seattle, Executive Service Department,* 156 P.3d at 195.

[55] *Id.*

[56] *Id.*

are consistent with the approach taken by this Court. Ford has engaged in wholesaling of goods in Delaware just as it did in the State of Washington. The responses to Ford's arguments, given the facts of this case, are of equal strength if not stronger. Ford cannot argue otherwise.

Lastly, given the view of § 2902 adopted here, it is not necessary to reach Ford's argument that the Director of Revenue could constitutionally assess a gross receipts tax on Ford's wholesaling activity in Delaware by utilizing any of the alternative methods proposed by Ford.

CONCLUSION

Based upon the foregoing, [t]he decision of the Director of Revenue must be, and hereby is, **affirmed.** There is substantial evidence to support the conclusion that Ford engaged in activities during the relevant periods of time which were subject to the gross receipts tax imposed pursuant to 30 Del. C. § 2902. Nor was any legal error committed by the Director of Revenue in reaching that result. Lastly, neither the aforementioned statute or the manner in which it was imposed, run afoul of Article I, § 8 of the United States Constitution or the Fourteenth Amendment to that authority.

/s/ Toliver
TOLIVER, JUDGE

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

FORD MOTOR COMPANY, Petitioner Below-Appellant,	§	No. 257, 2008
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
DIRECTOR OF REVENUE Respondent Below-Appellee.	§	C.A. No. 04C-02-155

Submitted: December 23, 2008
Decided: January 13, 2009

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY,** Justices, constituting the members of the court *en Banc*.

ORDER

This 13th day of January 2009, the Court, having carefully considered the appellant's motion for rehearing *en Banc* of the Order issued by this Court on December 8, 2008, and it appearing that the same should be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion for rehearing *en Banc* is DENIED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

APPENDIX D

DELAWARE CODE

TITLE 30. STATE TAXES

PART III. OCCUPATIONAL AND BUSINESS LICENSES AND TAXES

CHAPTER 29. RETAIL AND WHOLESALE MERCHANTS' LICENSE REQUIREMENTS AND TAXES

§ 2901. Definitions.

As used in this chapter:

(1) "Goods" includes produce, merchandise, goods, wares, items, products, crops, livestock, animals, metals, gems or any tangible personal property of whatever description, whether new or used, and includes alcoholic beverages of every nature.

(2) "Gross receipts":

a. In the case of a retailer, "gross receipts" includes total consideration received for all goods sold or services rendered within this State, but shall not include tobacco products taxes or motor fuel taxes paid or payable to the State under Part IV of this title or gasoline and special fuel taxes paid or payable to the federal government under Internal Revenue Code § 4041 [26 U.S.C. § 4041] or § 4081 [26 U.S.C. § 4081]; or receipts derived from the sale of petroleum products provided such products were sold to the retailer by a person who is licensed under this chapter and such sale is described in the definition of "gross receipts" with regard to such person.

b. In the case of a wholesaler, "gross receipts" includes total consideration received from sales of tangible personal property physically delivered within this State to the purchaser or the purchaser's agent, but shall not include: (i) Delivery to the United States mail or to a common or contract carrier for shipment to a place outside this State; * * * .

(3) "Person" includes an individual, partnership, firm, cooperative, corporation or any association of persons acting individually or as a unit.

(4) For purposes of this chapter, the term "physically delivered within this State" includes delivery to the United States mail or to a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery.

* * *

(7) a. "Wholesaler," for purposes of this chapter, includes:

1. Every person engaged, as owner or agent, in the business of selling to or exchanging with another person goods for cash or barter or any consideration for the purpose of resale by the person acquiring the goods sold or exchanged, and includes without limitation goods sold or exchanged through outlets, warehouses and distribution depots of persons whose principal place of business is located inside or outside this State and also includes the sale of machinery,

supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity, which business or activity is subject to the tax imposed by this part; provided, nevertheless, that sales to the United States or any agency or instrumentality thereof, or sales to this State, or any agency or political subdivision thereof, shall be deemed to be sales at wholesale;

2. Every person engaged in the processing of food or foodstuffs, which food or foodstuffs are to be resold by the person acquiring the food or foodstuffs from the person engaged in the processing. For purposes of this chapter, every person engaged in the bakery, poultry processing or cannery business shall be considered engaged in the processing of food or foodstuffs and a wholesaler;

3. Persons engaged in the business of buying, selling or shipping of commercial feeds;

4. Persons engaged in the business of selling any form of combustible fuel for heating or cooking, regardless of whether purchased for resale or ultimate consumption;

5. Persons other than owners or operators of nurseries or farms engaged in the business of operating a place where trees, shrubs, plants, flowers and the like are purchased from another person for cash or barter or any consideration for the purpose of

resale by the person acquiring such goods; and

6. Every person engaged in the business of catalog or mail-order distribution of manufactured goods, when such persons do not own, operate or engage in any retail business within the State other than that described in this paragraph.

b. For purposes of this chapter, the word "wholesaler" shall not apply to a person who is licensed to catch, take, and sell eels, food fish or shellfish by the Delaware Department of Natural Resources and Environmental Control pursuant to Chapters 9 and 18 and Part II of Title 7 of the Delaware Code.

* * *

DELAWARE CODE

TITLE 30. STATE TAXES

PART III. OCCUPATIONAL AND BUSINESS LICENSES AND TAXES

CHAPTER 29. RETAIL AND WHOLESALE MERCHANTS' LICENSE REQUIREMENTS AND TAXES

§ 2902. Wholesaler license requirements; license fee; additional fee on aggregate gross receipts; statements required

(a) For the purposes of this section, "wholesaler" shall not include those wholesalers included in paragraphs 2. and 3. of § 2901(7)a. of this title.

(b) Any person desiring to engage in business in this State as a wholesaler shall first obtain a license from the Department of Finance and pay therefor a fee of $75 for each place of business. Such license shall be valid until January 1 at which time it may be renewed for a full year and every year thereafter; provided, that the wholesaler pays the fees required by subsection (c) of this section, makes application therefor and payment of $75 for each place of business.

(c) (1) In addition to the license fee required by subsection (b) of this section, every wholesaler shall also pay a license fee at the rate of 0.384% of the aggregate gross receipts attributable to sales of tangible personal property physically delivered within this State, which fee shall be

payable monthly on or before the 20th day of each month with respect to the aggregate gross receipts for the immediately preceding month. In computing the fee due on such aggregate gross receipts for each month, there shall be allowed a deduction of $50,000. For purposes of this subsection, all branches or entities comprising an enterprise with common ownership or common direction and control shall be allowed only 1 monthly deduction from the aggregate gross receipts of the entire enterprise. The monthly returns shall be accompanied by a certified statement on such forms as the Department of Finance shall require in computing the fee due.

(2) Notwithstanding paragraph (1) of this subsection, if the taxable gross receipts prescribed therein during the lookback period as defined in § 2122 of this title do not exceed $750,000, the return and payment of the additional license fee imposed for such month shall be due on or before the last day of the 1st month following the close of the quarter. In the case of such return, in computing the fee due on such aggregate gross receipts for each quarter, there shall be allowed a deduction of $150,000. For purposes of this paragraph, all branches or entities comprising an enterprise with common ownership or common direction and control shall be allowed only 1 quarterly deduction from the aggregate gross receipts of the entire enterprise. The quarterly return shall be accompanied by a certified statement on such forms as the Department of Finance shall require in computing this fee due.

(3) There shall be added to the tax provided in paragraph (1) of this subsection an additional tax of 0.240% on all taxable gross receipts determined under this section which are derived from the sale of petroleum products defined in § 2901(8) of this title.

(4) There shall be added to the taxes provided in paragraphs (1) and (3) of this subsection an additional tax as provided in § 9114 of Title 7.

(5) [Repealed.]

(6) The Director of Revenue is authorized to issue regulations providing for exemption certificates to be given by purchasers to wholesalers to document wholesale sales which, pursuant to § 2901(2)b.(vi) of this title, do not result in taxable gross receipts. A wholesaler is entitled to rely upon an exemption certificate valid on its face and in compliance with the regulations for purposes of computing the tax due under this section and shall not be liable for any tax attributable to sales covered by exemption certificates that are invalid. Any person providing an exemption certificate that is invalid shall, in addition to any prosecution under subchapter V of Chapter 5 of this title, be liable for the tax due (calculated without reference to the monthly exclusion in subsection (c)(1) of this section), plus interest and a penalty under § 535(a) of this title equal to 75% of the underpayment of tax attributable to sales covered by the invalid exemption certificates.

Supreme Court, U.S.
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No. 08-1409

In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Delaware Wholesale Merchants' License Tax, 30 Del. C. §2902, as applied to the wholesaling activity of Ford Motor Company ("Ford"), is fairly apportioned under the Commerce Clause of the Constitution of the United States when Ford engages in regular, systematic solicitation of dealers in Delaware, delivers the vehicles sold to dealers into the State and requires dealers to engage in other business practices designed to boost Ford's sales and when only gross receipts from sales of goods physically delivered to dealers are taxed.

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STATEMENT OF JURISDICTION

The Supreme Court of the State of Delaware (the "Delaware court") entered judgment on December 8, 2008. On January 13, 2009 it denied Petitioner's motion for rehearing *en banc*. On April 2, 2009, Justice Souter granted Petitioner an extension of time within which to file a petition for a writ of certiorari to and including May 13, 2009. Petitioner filed its Petition for a Writ of Certiorari on May 13, 2009 (the "Petition"), and the Court placed the Petition on the docket on May 18, 2009.

This Court's jurisdiction is properly invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Introduction

The sole issue in this case is whether the Delaware Wholesale Merchants' License Tax, 30 Del. C. §2902, (the "Wholesalers' Tax"), as applied to the wholesaling activity of Ford Motor Company ("Ford") in selling and delivering vehicles to automobile dealers in Delaware, is fairly apportioned under the Commerce Clause of the Constitution of the United States, U.S. Const. art. I, §8, cl. 3, as interpreted by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and its progeny. More specifically, the question is whether the Wholesalers' Tax meets the "external consistency" test for fair apportionment set forth in *Container Corporation of*

America v. Franchise Tax Board, 463 U.S. 159, 169-170 (1983), and other cases decided by this Court. The Delaware court, applying well established dormant Commerce Clause principles from *Complete Auto Transit* and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and the external consistency principles in *Container Corporation*, held that the Wholesalers' Tax meets the external consistency test and, therefore, that it is fairly apportioned. No review of the decision of the Delaware court is required because the Delaware court's analysis is in harmony with the decisions of this Court, and does not conflict with the holdings of the highest courts of various States in the cases cited by Petitioner.

Delaware's Wholesalers' Tax

The Wholesalers' Tax applies to "[a]ny person desiring to engage in business in [Delaware] as a wholesaler. . . ." 30 Del. C. §2902(b). The tax consists of a flat $75 annual fee, plus a percentage of the "aggregate gross receipts attributable to sales of tangible personal property *physically delivered within [Delaware]*. . . ." *Id.* at §2902(b) & (c)(1) (emphasis supplied). A wholesaler is "[e]very person engaged . . . in the business of selling to or exchanging with another person goods . . . for the purpose of resale by the person acquiring the goods sold or exchanged. . . ." *Id.* at §2901(11)a.1. Thus, the Wholesalers' Tax is a gross receipts tax on the activity of wholesaling in Delaware. Ford agrees that it fits the definition of

"wholesaler". *Ford Motor Company v. Director of Revenue*, 963 A.2d 115, 119 (Del. 2009) (Petitioner's App. at 7a).

The Wholesalers' Tax uses a "destination test" to determine taxable and non-taxable gross receipts. The tax is imposed on gross receipts constituting "total consideration received from sales of tangible personal property *physically delivered within this State to the purchaser or purchaser's agent. . . .*" 30 Del. C. §2901(4)b (emphasis supplied). The statute also provides that "the term 'physically delivered within this State' includes delivery to the United States mail or to a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery." *Id.* at §2901(7). In contrast, gross receipts from goods delivered outside of the State or delivered in Delaware to the mail or a common or contract carrier for shipment outside of Delaware are not taxable. *Id.* at §2901(4)b(i); *KMC Foods, Inc. v. Director of Revenue*, 2002 WL 31028797 (Del. Super. Ct. 2002), *aff'd w/o pub. opin.*, 815 A.2d 348 (Del. 2003).

Ford's Wholesaling Activities

Ford is a Delaware corporation headquartered in Michigan that manufactures and sells motor vehicles and motor vehicle parts. *Ford Motor Company*, 963 A.2d at 117 (Petitioner's App. at 3a). All manufacturing activity takes place outside of Delaware. *Id.* Ford sells vehicles and parts to eleven independent

dealers in Delaware for resale to the dealers' retail customers. *Id.* After a forecasting process and development of a sales plan for each dealership based on Ford's production and the dealers' likely needs, Ford District and Zone Managers in its sales division make frequent visits from their offices in New Jersey and Virginia to each Delaware dealer at its dealership in order to persuade the dealer to commit to buying certain models and quantities of Ford vehicles. *Id.*

Ford also engages in other practices to boost sales to Delaware dealers. It enters into a Sales and Service Agreement with each dealer that imposes significant requirements on the dealers' conduct of business that are designed to enhance the Ford brand and both vehicle and parts sales. *Id.* This agreement binds the dealers to certain sales practices and inventory requirements, the performance of warranty and other service work on Ford vehicles, the display of signage and the use of Ford trademarks. *Id.* (Petitioner's App. at 3a-4a). Ford also engages in extensive national advertising campaigns and sales promotional activities and contributes to local dealer advertising funds, all of which contribute to sales to Delaware dealers. *Id.* at 117 (Petitioner's App. at 3a).

Ford strictly controls the delivery process as part of its wholesaling activity because the dealers are contracting for vehicles to be delivered to their lots in Delaware in condition to be sold as new. *Id.* at 122 (Petitioner's App. at 14a). Ford's control of vehicle shipment to the dealer is necessary to ensure that

vehicles arrive in pristine condition. Del. Supr. Ct. App. A139-140. After assembly outside of Delaware, Ford ships vehicles by rail from the assembly plant to a "mixing center" in Ohio for sorting, then further by rail to "destination ramps" in Maryland or Pennsylvania for re-sorting, then by truck to dealers. *Id.* at 118 (Petitioner's App. at 4a). Ford or its contract logistics provider, not the Delaware dealer, hires and oversees the performance of its contract rail and truck carriers from its "drop zone" at the assembly plant through rail transport, sorting, re-transport and the unloading of vehicles from trucks at the dealer's premises. *Id.* at 118, 122 (Petitioner's App. at 4a, 14a); *see also* Del. Supr. Ct. App. A26-27, A109, A187, A189 & A195-200. Ford, not the Delaware dealers, makes payment to the carriers. *Ford Motor Company*, 963 A.2d at 117 (Petitioner's App. at 4a); *see also* Del. Supr. Ct. App. A29-30. The dealers' contact with Ford's distribution chain occurs only upon delivery at the dealership in Delaware, when dealers inspect the vehicles and accept or reject them. Del. Supr. Ct. App. A30, A199-200; A310-312.

Although title to the vehicles passes technically to the dealers at the manufacturing plant, Ford continues to bear financial risk for the vehicles until delivery at the dealers' premises. *Ford Motor Company*, 963 A.2d at 118, 122 (Petitioner's App. at 4a-5a, 14a). Ford bears the cost of repairing vehicles damaged in transit or of procuring insurance from its captive insurance subsidiary against such damage

(naming itself as loss payee), and it bears responsibility for manufacturing defects. *Id.*; *see also* Del. Supr. Ct. App. A109-110 (Stipulation ¶21), A287-288 (Sales and Service Agreement §11(c)), A313 (Warranty Manual p.2-8). For damage in transit over $501 per vehicle, Ford does not permit the vehicle to be sold as new, repurchases the vehicle from the dealer and takes charge of disposing of it. *Ford Motor Company*, 963 A.2d at 118.

REASONS FOR DENYING THE PETITION

I. Review Is Not Necessary In This Case, Because The Decision Of The Delaware Court Is Consistent With This Court's Decisions On Apportionment of Gross Receipts Taxes On Sales Of Goods.

The Wholesalers' Tax is consistent with this Court's decisions on the apportionment of gross receipts taxes on interstate sales of goods. *See Tyler Pipe*, 483 U.S. 232 (1987); *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975). The tax is fairly apportioned because a gross receipts tax that reaches only gross receipts from wholesale sales of goods delivered into a State is fairly apportioned within the meaning of *Complete Auto Transit*, 430 U.S. 274 (1977), and its progeny, regardless of whether the tax base is divided, as is the Wholesalers' Tax, by a destination test or by single sales factor formula apportionment. In *Complete Auto Transit*, the Court began to ignore formalistic

statutory drafting differences and focused instead on the practical effects of the tax. 430 U.S. at 279; *see also Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 180-183 (1995) (historical summary of cases before *Complete Auto Transit*). The Delaware court recognized and applied this principle in its decision below. It held that the Delaware tax passed the external consistency test because "the Wholesalers' Tax is not 'out of all appropriate proportion to the business transacted' in this state, nor is the result 'grossly disproportionate.'" *Ford Motor*, 963 A.2d at 122 (*quoting Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169-170 and *Moorman Manufacturing Company v. Bair*, 437 U.S. 267, 272 & 274 (1978) (Petitioner's App. 9a)). Accordingly, the Delaware court held that the Wholesalers' Tax was externally consistent and fairly apportioned.

The purpose of the fair apportionment requirement is to ensure that a state taxes only its fair share of interstate activity. *See, e.g., Jefferson Lines*, 514 U.S. 175, 184 (1995); *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989). This Court has held consistently that States enjoy wide latitude in determining how to divide the tax base to achieve this purpose, and this Court has on several occasions declined to require a specific method of doing so. *Moorman Manufacturing Company v. Bair*, 437 U.S. 267, 274 (1978); *accord Jefferson Lines*, 514 U.S. at 195; *Goldberg*, 488 U.S. at 261; *Container Corporation*, 463 U.S. 164 (1983). The Court will not invalidate a fairly apportioned tax

simply because its method of dividing the tax base varies from a prevailing approach adopted by other states. *Container Corporation*, 463 U.S. at 171 (discussing *Moorman*, 437 U.S. at 278-280).

Ford argues that the Delaware court's decision, as well as the decisions of this Court in *Tyler Pipe* and *Standard Pressed Steel,* cannot be reconciled with its decision in *Jefferson Lines*. This argument proves too much; the Court cited *Tyler Pipe* in the *Jefferson Lines* opinion without criticism. It also cited with approval a case that Ford does not cite in the Petition: *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). *Jefferson Lines*, 514 U.S. at 186. In *Moorman*, this Court held that an income tax was fairly apportioned. The tax in *Moorman* used a single sales factor apportionment formula that produces a division of the tax base equivalent to the destination test in the Wholesalers' Tax. Indeed, the Court in *Moorman* noted the similarity, as it did again in *Tyler Pipe*, 483 U.S. 251.

In *Jefferson Lines*, 514 U.S. 175 (1995), the Court analyzed a retail sales tax on bus tickets sold for transportation services rendered in more than one State. In holding that the sales tax was fairly apportioned, the Court distinguished the sales tax from gross receipts taxes, which it had previously treated as a variety of income tax. *Id.* at 190 (discussing *Central Greyhound Lines, Inc., of New York v. Mealey*, 334 U.S. 653 (1948) (requiring mileage apportionment of gross receipts from interstate bus ticket sales). In its discussion of the

external consistency test, the Court wrote that "The very term 'apportionment' tends to conjure up allocation by percentages . . ."; however, the Court did not hold that formula apportionment was required in order for a gross receipts tax to be fairly apportioned. *Jefferson Lines,* 514 U.S. at 186. Rather, it held only that a State must fashion its tax to reach only its fair share of an interstate transaction, *i.e.,* that part of value fairly attributable to economic activity in the State. *Id.* at 185. The Wholesalers' Tax does precisely that.

Ford argues that because the Wholesalers' Tax is an activities tax, not a transaction tax, formula apportionment measured by wholesaling activities must be used. Ford also wrongly argues that the Delaware court treated the Wholesalers' Tax as a transaction or sales tax. Ford's argument ignores that the definition of taxable gross receipts in 30 Del. C. §2901(4)b is functionally equivalent to a single factor apportionment formula, based on sales and using a destination test[1] and that it is, therefore, externally

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[1] An example illustrates the equivalence. Assume Delaware wholesale gross receipts under the 30 Del. C. §2901(4)b destination test of $20. Under a *Moorman*-style single sales factor apportionment formula which uses a destination test to apportion gross receipts by formula, the result is the same. Assume that total wholesale gross receipts of the taxpayer are $300. A single sales factor apportionment formula would operate as follows: ($20 Delaware gross receipts ÷ $300 total gross receipts) x ($300 total gross receipts) = $20 apportioned to Delaware under the formula.

consistent in accordance with the holding in *Moorman*. This Court has held that both gross receipts taxes using a destination test and income taxes using a single sales factor apportionment formula based on a destination test are fairly apportioned and has noted the similarity between the two taxes. *See Tyler Pipe*, 483 U.S. 232, 251 (1987), *vacating and remanding on another point*, 715 P.2d 123 (Wash. 1986) (gross receipts tax using destination test); *Moorman*, 437 U.S. 267, 280-281 (1978) (income tax using single sales factor, destination test).

The reason underlying the *Moorman* court's decision was that Iowa sales were a reasonable representational factor for activity in Iowa and thus for dividing the income earned in that State. It found no proof that the other factors argued for contributed to the generation of income and that sales did not. *Moorman*, 437 U.S. at 272. Ford ignores sales entirely as a factor in generating income. The Court in *Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358 (1991), rejected a similar argument that sales added nothing to the taxable value under Michigan's value added tax. *Id.* at 382. As this Court found in *Moorman*, analytically, formula based apportionment based on the ratio of locally destined sales to all sales is indistinguishable from using gross receipts from goods physically delivered in a state as the tax base. In either case, the income apportioned by sales or the gross receipts from State-destined sales represent wholesaling activity in the taxing State, which provides the

market that makes the sales possible in the first place.

So also, in this case, Delaware destination sales are a reasonable measure of Ford's wholesaling activities and income generation in Delaware and thus are "externally consistent." Ford engages in the variety of activities that are comprised in the activity of wholesaling in various states and that are designed to increase its wholesale sales in all states, but it clearly has its district and zone managers visit Delaware regularly to stimulate dealer sales in Delaware; its national advertising and sales incentive campaigns are, in part, directed toward increasing its Delaware market; it permits use of strictly regulated signage and its trademarks to promote Delaware sales and it controls a complicated logistics process to make delivery of undamaged vehicles to its Delaware dealers, and ultimately, their buyers. All of these activities are aimed at exploiting the Delaware market for Ford's products. Gross receipts realized in a market provided by Delaware are a reasonable factor to represent this Delaware wholesaling activity.

Moreover, nine years after *Moorman,* and citing that case with approval, this Court found that a gross receipts tax that is analytically indistinguishable from Delaware's was fairly apportioned under the Commerce Clause. In *Tyler Pipe*, 483 U.S. 232 (1987), *vacating and remanding on another point,* 715 P.2d

123 (Wash. 1986), the Court found on analogous facts that a destination test gross receipts tax[2] imposed on the activity of wholesaling and measured by a percentage of gross proceeds from sales at wholesale in the State complied with the requirement of the Commerce Clause. In that case, the taxpayer was headquartered outside of Washington, had no officers or employees in Washington, manufactured all products outside of the state and shipped them to customers from out of state. 483 U.S. at 249; *see also* 715 P.2d at 124-125. As in this case, the taxpayer's regional sales management and marketing division employees were located outside of the taxing jurisdiction, Washington. 483 U.S. at 249; *see also* 715 P.2d at 125. The taxpayer used independent manufacturer's representatives based in Washington, not its own employees, to market its products at wholesale. 483 U.S. at 249; *see also* 715 P.2d at 125. Ford argues that *Tyler Pipe* is factually distinguishable because all wholesaling activity took place in Washington; however, the facts recited above belie that assertion. The facts in *Tyler Pipe* are, in all salient points, identical to the facts in this case. In both cases, sales management outside of the taxing

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[2] The Washington tax defines sales producing taxable gross receipts as "any transfer of the ownership of, title to, or possession of property for a valuable consideration." Wash. Rev. Code §82.04.040(1). Since at least 1947, Washington has interpreted this statute as establishing a destination test. Wash. Admin. Code §458-20-103 (2008); *see also Ford Motor Company*, 963 A.2d at 121 n.28 (Petitioner's App. 11a, n.28).

state directed continuous, regular and substantial wholesaling activities conducted in the taxing state, in *Tyler Pipe* by independent sales representatives and in this case by Ford employees sent into Delaware to meet with dealers.

The Court found that the tax was fairly apportioned because it considered the portion of the wholesaling activity represented by the gross receipts from in-state sales as having occurred wholly within Washington. *Tyler Pipe*, 483 U.S. at 251 ("[T]he activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly with Washington that no other state has jurisdiction to tax"). In reaching its conclusion, the Court relied on *Moorman*, in which it had equated a constitutionally acceptable single factor apportionment formula based on a sales destination test with a destination-based gross receipts tax for purposes of the fair apportionment test. *Tyler Pipe,* 483 U.S. at 251. It also relied on *Standard Pressed Steel*, 419 U.S. 560 (1975), which pre-dated *Complete Auto Transit* but which held that a wholesale gross receipts tax on gross receipts from sales to a local customer was "perfectly apportioned to the activities taxed." 419 U.S. at 564. Ford mischaracterizes the *Tyler Pipe* case as focusing solely on the relationship between the activities of manufacturing and wholesaling. This is true in the portion of the opinion discussing discrimination under the Commerce Clause. 483 U.S. at 239-248. It is not true of the portion of the opinion focusing on fair

apportionment. *Id.* at 251. There the Court examined only the activity of wholesaling. *Id.*

In summary, the Delaware court's decision in the case below is entirely consistent with this Court's fair apportionment decisions pertaining both specifically to gross receipts taxes and to income taxes more generally. The Delaware tax uses gross receipts from sales of Delaware destined goods as a measure of Delaware activity and seeks to tax only those gross receipts. Accordingly, review by this Court is unnecessary.

II. Review Is Not Necessary, Because The Decision Of The Delaware Court Does Not Conflict With The Decisions Of Other State Courts.

The cases decided by the courts in other States cited by Ford are completely reconcilable with the holding of the Delaware court in this case. In those cases, the statute or ordinance sought to tax the entire tax base from an activity, whether produced inside or outside of the taxing jurisdiction. In this case, Delaware's Wholesalers' Tax taxes only gross receipts from sales of goods physically delivered to the purchaser in Delaware, and does not purport to reach sales of goods physically delivered outside of Delaware. It is this crucial distinction in the division of the tax base that Ford's discussion of the cases decided in other States fails to address.

In *Northwood Construction Company v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), *cert. denied*, 544 U.S. 962 (2005), a township sought to tax gross receipts of a taxpayer headquartered there, but whose gross receipts derived in large part from construction services provided at construction sites outside of Pennsylvania. Under the facts of the case, no apportionment or other division of the tax base whatsoever was available. The Pennsylvania Supreme Court held that the ordinance's failure to make any effort to divide the gross receipts tax base caused the tax to fail the external consistency test and thus the fair apportionment requirement of *Complete Auto Transit*. *Id.*, 856 A.2d at 803-804. The court held that attributing 100 percent of the taxpayer's total gross receipts from all sources to the taxing jurisdiction was "'out of all appropriate proportion to' the business transacted in the Township and has 'no rational relationship' to [the taxpayer's] business in the Township." *Id.* at 803 (*quoting Hunt-Wesson, Inc. v. Franchise Tax Bd. of California*, 528 U.S. 458, 464 (2000) and *Jefferson Lines*, 514 U.S. at 185 (1995)). Thus, on the facts before it, the Pennsylvania Supreme Court held only that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, the Wholesalers' Tax only reaches Ford's wholesale gross receipts from goods sold and physically delivered by Ford to its Delaware dealers and does not seek to tax gross receipts from goods sold and physically delivered to purchasers outside of Delaware. Thus, unlike in the *Northwood* case, the gross receipts tax base is

divided according to wholesale activity in Delaware and elsewhere, as measured by the statute's destination test. The holdings of the Delaware court in this case and the Pennsylvania court in *Northwood* are in accord.

Similarly, the tax at issue in another Pennsylvania case, *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), suffered from the same defect as the tax in *Northwood*. In that case, Philadelphia sought to tax all of the gross receipts of the Philadelphia Eagles football team constituting "media receipts" for live telecasts of football games, half of which the team played outside of Philadelphia. The city's business privilege tax treated the media receipts as copyright royalties and allocated all such royalties to the taxpayer's commercial domicile, which was the city. *Id.* at 113; *see also* City of Philadelphia Business Privilege Tax Regulations §322.[3] Thus, as in the *Northwood* case, the tax at issue made no division of the gross receipts tax base at issue whatsoever, notwithstanding that half of the games giving rise to the team's media

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[3] Notably, the city uses the same "destination test" rule as the Wholesalers' Tax for dividing the gross receipts tax base from sales of personal property. City of Philadelphia Business Privilege Tax Regulations §304. The Pennsylvania court also noted that the city similarly taxes only gross receipts from services performed within the city limits, not outside of the city limits. *Philadelphia Eagles*, 823 A.2d at 117 n.9 (*citing* Philadelphia Code §19-2601; *see also* City of Philadelphia Business Privilege Tax Regulations §310).

receipts were played outside of the taxing jurisdiction. Accordingly, the court held that the taxpayer carried its burden of proving by clear and cogent evidence that the city's levy on 100% of the media receipts was inherently arbitrary and had no rational relationship to the club's activity in Philadelphia. *Philadelphia Eagles*, 823 A.2d at 132. The *Philadelphia Eagles* case stands only for the proposition that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, as pointed out above, Delaware's Wholesalers' Tax does not tax all gross receipts from all wholesale sales, wherever made, but rather taxes only gross receipts from wholesale sales of goods physically delivered to the buyer in Delaware. Thus, there is no conflict between the holding of the Pennsylvania Supreme Court in *Philadelphia Eagles* and the Delaware court in this case.

Ford also cites *City of Winchester v. American Woodmark Corporation*, 471 S.E.2d 495 (Va. 1996). As in the *Northwood* and *Philadelphia Eagles* cases, there is no conflict with the Delaware court's decision in this case. The gross receipts tax at issue in *American Woodmark* permitted no division of the tax base at all. Instead, the tax attributed to the city, which was the location of the taxpayer's corporate headquarters, 100% of the taxpayer's total gross receipts, although the taxpayer operated manufacturing, warehousing and distribution facilities in thirteen States. The Virginia court found that "[b]y definition, assessments based on 100% of American

Woodmark's revenues included revenues realized from value produced in locations other than the taxing jurisdiction." *Id.* at 498. Accordingly, the Virginia court held that the taxpayer met its burden of proof and that the tax was not fairly apportioned because it failed the external consistency test. *Id.* at 498. As do the *Northwood* and *Philadelphia Eagles* cases, *American Woodmark* stands only for the proposition that a complete failure to divide the gross receipts tax base failed the external consistency test. In this case, in contrast, Delaware seeks to tax only gross receipts from wholesale sales of goods delivered to Delaware retailers and does not tax gross receipts from sales of goods delivered outside of the State. Thus, the Delaware court's decision in this case is consistent with the Supreme Court of Virginia's decision in *American Woodmark*.

Ford also cites *Northwest Energetic Services, LLC v. California Franchise Tax Board*, 159 Cal. App. 4th 841 (Cal. App. 2008). In that case, as in the *Northwood, Philadelphia Eagles* and *American Woodmark* cases, a tax was imposed on the taxpayer's worldwide income wherever earned without any apportionment or other method of dividing the tax base. The taxpayer in that case was an LLC formed under Washington law that merely registered to do business with the California Secretary of State but that in fact carried on no business activities in California. *Id.* at 849. The California Court of Appeal held that the tax was unfairly apportioned because it was *both* internally and externally inconsistent. *Id.* at 862-864.

Again, there is no conflict between this case and the decision of the Delaware court; the Wholesalers' Tax is both internally and externally consistent, because it purports to tax only the gross receipts produced by sales of goods delivered in Delaware.

The same problem exists with Ford's reliance on *General Motors Corporation v. City of Kansas City*, 1994 WL 49620 (Mo. Ct. App. 1994), *vacated,* 895 S.W.2d 59 (Mo. Ct. App. 1995), *cert. denied,* 516 U.S. 909 (1995). In that case a gross receipts tax on manufacturing taxed the entire value of automobiles manufactured in Kansas City, although most of the parts assembled into automobiles were manufactured elsewhere. Thus, again, no provision for division of the tax base existed.

Ford also cites *General Motors Corporation v. City and County of Denver,* 990 P.2d 59 (Colo. 1999). That case is wholly inapposite, because the tax in question was a use tax, not a gross receipts tax. In its Petition Ford cites *Jefferson Lines*, 514 U.S. 175, 186-190 (1995) for the proposition that apportionment in the context of a gross receipts tax must take into account the location where revenue is generated. As discussed above in argument I, the destination test of the Wholesalers' Tax represents such an allocation.

Finally, Ford cites *Southern Pacific Transportation Company, Inc. v. Arizona Dept. of Revenue*, 44 P.3d 1006 (Ariz. 2002), as in conflict with the decision of the Delaware court. That case, like the *Philadelphia Eagles* case, taxed gross receipts derived from

transportation services performed in more than one State. The Arizona intermediate appellate court, relying on *Jefferson Lines*, held that the Arizona tax was not externally consistent and required mileage apportionment. The Wholesalers' Tax, in contrast, taxes only gross receipts from wholesale sales of goods delivered in Delaware and nowhere else.

The decision of the Delaware court is also in harmony with the recent decisions of the Supreme Courts of Washington and Hawai'i in *Ford Motor Company v. City of Seattle*, 156 P.3d 185 (Wash. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1224 (2008), and *Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804 (2004). The *City of Seattle* case is most closely on point. As in this case, the taxes in issue were on gross receipts from wholesale sales. *City of Seattle*, 156 P.3d at 188. Ford had no offices in two Washington cities that imposed gross receipts taxes based on wholesale sales to dealers in the cities, but, as in Delaware, Ford sent its representatives into the cities to conduct wholesaling activity. *Id.* at 187. As in this case, the gross receipts in issue were those derived from the sale of goods delivered into the taxing jurisdictions. *Id.* at 191. As here, Ford's activities within the taxing jurisdictions created the opportunity for the sales; thus, the gross receipts were derived from Ford's wholesaling activity. *Id.* at 192. The Washington court held that the cities' taxes, like the Washington B&O tax at issue in *Tyler Pipe*, were both internally and externally consistent because wholesale sales to retailers in the cities was an

activity viewed as occurring only within the cities and inherently apportioned; accordingly, taxation of the gross receipts from wholesale sales of goods delivered in the cities did not reach extraterritorial value. *Id.* at 193-194.

The Court of Appeals of Washington also determined that Seattle's gross receipts tax on wholesaling is fairly apportioned in *General Motors Corporation v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *review denied,* 84 P.3d 1230 (Wash. 2001), *cert. denied,* 535 U.S. 1056 (2002). In that case General Motors had no offices or employees in Seattle, but sent sales, service and parts representatives into the city to call on dealers on a monthly basis. *Id.* at 1024. Notably, it did not even solicit dealer orders in the city. *Id.* It also directed national advertising at Seattle and required dealers to perform warranty work on General Motors products. *Id.* at 1024-25. As in the *City of Seattle* case discussed above the tax was a gross receipts tax on wholesale sales of automobiles to dealers in the city. The Washington court held that the tax was internally consistent, because it taxed only gross receipts from Seattle-destined wholesale sales. *Id.* at 1030. The court rejected General Motors' argument that the tax was not externally consistent based on marketing activities' occurring both in Washington and in Michigan. *Id.* at 1030-31. The Washington court relied on this Court's holding in *Tyler Pipe,* 483 U.S. 232 (1987), that wholesaling activity with respect to sales within a state occur in the state of the sale. *General Motors*, 25 P.3d at 1031.

It also rejected the taxpayer's arguments that that this Court questioned the *Tyler Pipe* reasoning in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), or that the *Jefferson Lines* case held or implied that apportionment based on marketing activity was required. *General Motors*, 25 P.3d at 1032. Both the Supreme Court of Washington and this Court declined to review the decision in the *General Motors* case. The reasoning in this case and the case before the Court are in accord.

The Supreme Court of Hawai'i also sustained a gross receipts tax on the privilege of selling tangible personal property against a Commerce Clause challenge in *Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804 (Haw. 2004). In that case the taxpayer had no office, real property or employees in Hawai'i. *Id.* at 806-807. It sent employees into the state from time to time to engage in sales activities. *Id.* at 807-808. It shipped all goods to customers in Hawai'i F.O.B. shipping point on the mainland; thus, title passed to the Hawai'i customers outside of the state. *Id.* at 807. The tax was an activities tax for the privilege of "engaging or continuing to engage in the business of selling any tangible personal property whatsoever" at a percentage of "gross proceeds of sales" of tangible personal property. *Id.* (quoting Haw. Rev. Stat. §237-13(2)). The Hawai'i court found the tax to be fairly apportioned. It held that the tax was internally consistent because it reached only gross receipts from the sale of goods to customers located in Hawai'i. *Id.* at 816-817. The court found that Hawai'i

limited its taxing power to sales made to local customers and did not seek to tax sales made to customers outside of the state; thus, only the local component was taxed and only that portion of interstate revenues reasonably reflecting the in-state component of the taxed activity were reached. *Id.* at 817.

In summary, all of the cases cited by Ford can be reconciled with the decision of the Delaware court in this case. Although the conclusions differed, because the facts were different in different cases, the courts in all of the cases that Ford cites applied the same principles from this Court's cases that the Delaware court applied in this case. Accordingly, there is no reason to review this case.

III. Review Is Not Necessary On the Grounds Of Potential Multiple Taxation, Because That Potential Is Not Constitutionally Significant In This Case.

Ford argues in its Petition that the mere possibility of some level of multiple taxation serves to render the Wholesalers' Tax not fairly apportioned. This argument mischaracterizes this Court's jurisprudence on this point. In applying the external consistency test of fair apportionment, the Court recognizes that different methods of dividing the tax base may result in some permissible risk or actual level of multiple taxation. *Jefferson Lines,* 514 U.S. at

187-188; *Container Corporation*, 463 U.S. at 169-170; *see also Moorman*, 437 U.S. at 277-278. Ford actually argues that the Court should do what it has often refused to do: prescribe a single acceptable method of dividing the tax base.

Some "overlap" in different methods of dividing the tax base is consistent with the recognized principle that States enjoy wide latitude in determining how to divide the tax base to achieve external consistency and fair apportionment, and this Court has accordingly refused to require a particular method of apportionment. *Moorman*, 437 U.S. 267, 274 (1978); *accord Jefferson Lines,* 514 U.S. at 195; *Goldberg*, 488 U.S. at 261; *Container Corporation*, 463 U.S. 159, 164 (1983). For example, in *Moorman* this Court noted that overlap in taxation might occur even if the apportionment system were ostensibly identical, because definitions might differ. *Moorman*, 437 U.S. at 238 n.13 (noting that different definitions of what constitutes a sale could lead to inclusion of the same sale in different States' apportionment formulas). The Delaware court recognized this as well. *Ford Motor Company*, 963 A.2d at 122 (Petitioner's App. 15a). Similarly, in *Jefferson Lines*, this Court recognized that a succession of taxes by different states on distinct events was permissible. *Jefferson Lines,* 514 U.S. at 187-188, 192 (succession of taxes on distinct events in the chain of commerce; gross receipts tax on out of state portion of bus travel at issue). This Court has held, citing *Moorman*, that "multiple taxation placed upon interstate commerce

by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the accidental incident of interstate commerce being subject to two different taxing jurisdictions." *Jefferson Lines*, 514 U.S. at 192 (internal quotations omitted). The tax survives external consistency analysis, unless the taxpayer shows that there is no rational relationship between the tax measure attributed to the state and the contribution of local business activity to the entire value. *Trinova*, 498 U.S. at 380 (1991). Ford has made no such showing here.

The Delaware court followed these principles in rejecting Ford's multiple taxation argument. In the Petition, as it did below, Ford argues for the very sort of judicial lawmaking to prescribe a specific method of dividing the gross receipts tax base that this Court rejected in *Goldberg* and *Moorman*. *Goldberg*, 488 U.S. at 261; *Moorman*, 437 U.S. at 278. In order to avoid all duplicative taxation, this Court would need to prescribe a single method of dividing the gross receipts tax base, contrary to its expressed refusal to do so. The Delaware court recognized this as well and rejected the argument. *Ford Motor Company*, 963 A.2d at 120 (Petitioner's App. 10a).

Ford raises the specter of 1,200 taxing jurisdictions all enacting differing statutes. Yet it has presented no evidence that this has happened. On closer examination, this is merely the same argument that this Court should prescribe a single method of dividing the gross receipts tax base. As pointed out above, this is something that the Court has refused to

do, holding instead that the Constitution commits policy decisions such as the promulgation of a uniform apportionment or division rule to Congress, not this Court. *Moorman*, 437 U.S. at 280; *see also Quill Corporation v. North Dakota*, 504 U.S. 298, 318-319 (1992) (Congress may be better qualified to determine requirement of physical presence for substantial nexus and has the power to do so under the Commerce Clause).

This Court should not now, as requested by Ford, depart from long established precedent pertaining to fair apportionment in the context of gross receipts taxes on the sale of goods. In *Standard Pressed Steel*, almost 35 years ago, this Court held that a gross receipts tax like the one in issue was fairly apportioned. 419 U.S. 560, 564. In 1977, the Court simplified and distilled its dormant Commerce Clause jurisprudence in *Complete Auto Transit,* approved the single sales factor apportionment formula in *Moorman* the next year and reiterated its *Standard Pressed Steel* conclusion in *Tyler Pipe* in 1987, relying also on *Moorman*. The concern for continuity, predictability and stability in the law should lead the Court to adhere to settled precedent. *Quill Corporation*, 504 U.S. 298, 317 (1992).

CONCLUSION

For the reasons set forth above, the Court should deny the Petition for a Writ of Certiorari.

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FORD MOTOR COMPANY,

Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

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REPLY BRIEF FOR PETITIONER

Respondent does not contest that the issues in this case are of enormous financial significance for every business that sells goods at wholesale and every jurisdiction that imposes a gross receipts tax (1200 and counting). As petitioner Ford Motor Company and its *amici* Council on State Taxation and the National Association of Manufacturers (two leading trade associations representing the interests of more than 600 of the largest businesses in the United States) demonstrate, the Delaware tax—a gross receipts tax on purportedly in-state wholesaling—poses grave risks to the national economy by taxing 100 percent of the gross receipts from sales that occur outside the taxing State, and the decision below conflicts with the decisions of six other state courts. And, as the petition demonstrates, the Delaware tax is not an isolated legislative attempt by a State to improperly expand its taxing jurisdiction beyond its borders. The petition should be granted.

A. Respondent's Contention That A Tax On 100 Percent Of The Gross Receipts From Goods Physically Delivered To The State Need Not Reflect Where The Value Underlying Those Receipts Was Earned Cannot Be Reconciled With *Jefferson Lines*

1. Respondent contends that the Supreme Court of Delaware's decision is consistent with this Court's precedent because a "gross receipts tax" applied to all the "gross receipts from wholesale sales of goods delivered into a State is fairly apportioned

within the meaning of *Complete Auto Transit*," *Inc. v. Brady*, 430 U.S. 274 (1977), "regardless of whether the tax base is divided * * * by a destination test or by single sales factor formula apportionment." Opp. 6. According to respondent, the apportionment of a gross receipts tax on wholesaling never needs to be "measured by wholesaling activities" that occur among several States, *id.* at 9, only that it be measured by receipts from sales delivered to in-state customers.

The blanket contention that taxing receipts from deliveries to in-state buyers reflects fair apportionment finds no support in this Court's unequivocal statement in *Oklahoma Tax Commission v. Jefferson Lines, Inc.* that a gross receipts tax is "simply a variety of a tax on income, which [is] required to be apportioned *to reflect the location of the various interstate activities by which it was earned*." 514 U.S. 175, 190 (1995) (emphasis added). Yet the ruling below, as well as the decisions of several other state courts of last resort, *see* Pet. 12-16, violates *Jefferson Lines* by authorizing a tax on 100 percent of the gross receipts from goods delivered into the State—over $700 million worth of sales in this case—irrespective of where the sales occurred and where the value underlying those receipts was generated.

2. This case presents an ideal vehicle to address this issue of significant constitutional magnitude and enormous financial consequence to both States and business alike, at a time when businesses are

struggling and States are aggressively seeking to expand their tax bases to avoid paying their creditors with IOUs.

Notwithstanding respondent's claim and the state court ruling below that Delaware alone had the right to tax petitioner's gross receipts from sales to Delaware-based independent dealers, Pet. App. 15a, respondent repeatedly *concedes* that what amounts to the vast majority of Ford's wholesaling activities that generated those sales occurred in other States. *See, e.g.*, Opp. 11 ("Ford engages in the variety of activities that are comprised in the activity of wholesaling *in various states* * * * ." (emphasis added)).[1]

The *only* wholesaling activities that occurred within Delaware, even by respondent's own recitation of the facts, were the occasional visits that Ford's out-of-state district and regional sales managers made to independent dealers in Delaware. Pet. 8. But respondent and the Delaware court place too much emphasis on those visits, which are relevant only in that they satisfy the constitutional requirement of a

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[1] Among the concessions that make this case an ideal vehicle, respondent concedes that the following "Wholesaling Activities" occurred outside Delaware: (1) the forecasting process and the development of a sales plan for each dealership, (2) the creation of Sales and Service Agreements between Ford and the dealerships, (3) the development and implementation of extensive national advertising campaigns, (4) the transfer of title to the independent dealers, and (5) the post-sale transfer of possession of the vehicles to a common carrier for shipment to Delaware. Opp. 3-5.

sufficient nexus between the taxed activity and the taxing State. *Complete Auto*, 430 U.S. at 279. Their existence does not answer the question of *how much* tax may be imposed without any apportionment for activities conducted or value added outside its border.

B. Review Is Necessary Because States Are Misreading This Court's Pre-*Jefferson Lines* Precedents To Tax Economic Activity In Other States

1. No precedent of this Court permits imposition of a gross receipts tax based solely on sales and applying a "destination test"

Contrary to respondent's suggestion, Opp. 9-11, *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), is not a blank check for States to apply a single-factor apportionment formula for *all* taxation purposes.

a. Respondent ignores that the tax upheld in *Moorman* was not a gross receipts tax but a net income tax. *Id.* at 269, 270 n.3. This Court has held that States may tax an apportioned share of the *total* net income of a multistate unitary business, in recognition of the fact that the whole of a business is more valuable than the sum of its parts and that expenses incurred in one State contribute to revenue generated in another. *See MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1506 (2008). A net income tax with a single apportionment factor

based on sales, as in *Moorman*, can be consistent with the unitary business principle because the receipts generated in each taxing State are reduced by a share of the expenses incurred throughout the Nation that contributed to the profit generated in the taxing State.

The issues raised by the Delaware gross receipts tax bear no relation to the apportionment issues with respect to the unitary business principle addressed in *Moorman*, because the Delaware tax fails to take into account any of the economic activities generating those receipts that are concededly attributable to other States. Delaware, instead, allocates to itself *all* $700 million of petitioner's gross receipts for goods delivered to Delaware.

Accordingly, respondent's tax is just like a transaction tax imposed on the seller, because it is "measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Jefferson Lines*, 514 U.S. at 186; *see also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.") Respondent attempts to evade that fatal conclusion by asserting that its statutory scheme "is functionally equivalent to a single factor apportionment formula" applied to net income taxes. Opp. 9. But that cannot be true here,[2]

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[2] Respondent's purported apportionment formula, Opp. 9 n.1, is fallacious because it "apportions" only receipts without

(Continued on following page)

as the Delaware court conceded that the tax at issue in this case was an "*unapportioned* tax on Ford's receipts from the sales of motor vehicles." Pet. App. 2a (emphasis added). And this Court has never upheld an unapportioned transaction tax imposed on the seller. Instead, it has held that gross receipts taxes on the seller are constitutionally subject to taxation anywhere where the value underlying those receipts was generated. *Jefferson Lines*, 514 U.S. at 190; Pet. 16-20.[3]

Respondent, therefore, is wrong that no double taxation occurs as a result of its gross receipts tax. Opp. 23-26. The parties *stipulated* that petitioner paid taxes on the same gross receipts in Missouri where the *sales* of many of the vehicles to Delaware dealers occurred. Del. S. Ct. App. A00113-A00114. But even if there were no evidence of double taxation, the growing tide of duplicative gross receipts taxes by other jurisdictions where petitioner is engaged in wholesaling obviated any need to "prove actual discriminatory impact" because the Commerce Clause does not "depend on the shifting complexities of the

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accounting for out-of-state expenses (*i.e.*, activities), as required under *Moorman*. The Delaware tax is a tax on wholesaling activities, and the State concedes that significant wholesaling activities occur outside of Delaware, and yet ascribes a value of zero to those activities and a value of 100% to those within Delaware.

[3] Even if such a transaction tax were upheld, Delaware's tax would be unconstitutional because only the States where the sales occurred, not Delaware, could impose such a tax.

tax codes of 49 other states." *Armco v. Hardesty*, 467 U.S. 638, 644 (1984).

b. Notwithstanding the clear mandate of *Jefferson Lines*, some state courts, like respondent, have misread *Moorman* to approve of unapportioned gross receipts taxes. *See Illinois Commercial Men's Ass'n v. State Bd. of Equalization*, 671 P.2d 349, 358 (Cal. 1983) (*Moorman* permits "an unapportioned tax measured by the total sales of a foreign corporation within a state * * * even though major functions which contributed to the value of the taxed product * * * occur outside the taxing state."); *Chicago Bridge & Iron Co. v. Department of Revenue*, 659 P.2d 463, 469, 472 (Wash. 1983) (reading *Moorman* as giving States broad latitude to tax income that was generated in a different State). That misapprehension of *Moorman* underscores the need for this Court's review. *See MeadWestvaco*, 128 S. Ct. at 1502.

c. Moreover, respondent is wrong that *Moorman* permits the use of a "destination test" for a single-factor apportionment formula based on sales, rather than looking to where the sales (*i.e.*, transfer of title and possession) actually took place. Opp. 9-10.

In *Moorman*, both the sale (*viz.*, the transfer of title) and the delivery of the goods to the purchaser took place within the taxing State. 437 U.S. at 269. Thus, neither *Moorman* nor any other decision by this

Court has held that a State may impose a gross receipts tax on sales that occur in another jurisdiction based on the fact that the purchaser contracts to have the goods shipped interstate via common carrier.

Indeed, this Court has held that for sales taxes the State of "transfer of ownership" may tax the sale and not the place of the goods' post-sale destination. *Jefferson Lines*, 514 U.S. at 187; *see also McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 328-329 (1944).[4]

In this case, the sales occurred long before they ever reached Delaware. Accordingly, even if the *Moorman* single-factor apportionment formula based upon sales were applicable, the decision below and the rulings of several other state courts, *see* Pet. 21-22, could not be sustained because *other* States where the sales actually occurred may be the jurisdictions entitled to tax the bulk of the receipts.

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[4] State courts are divided over whether the place of sale or of delivery is determinative for gross receipts taxes. *Compare Hercules Inc. v. Utah State Tax Comm'n*, 877 P.2d 133, 136-137 (Utah) (rejecting destination test for gross receipts taxes on sales of goods), *cert. denied*, 513 U.S. 1043 (1994), *with Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 810-811, 817 (Haw. 2004) (holding that gross receipts should be allocated to where the customer is located), *and Chicago Bridge & Iron Co. v. Washington*, 659 P.2d 463, 469 (Wash.) (same), *appeal dismissed*, 464 U.S. 1013 (1983). The present case also gives the Court an ideal vehicle to resolve that division among the state courts.

2. Respondent and several state Courts are misinterpreting *Tyler Pipe* to justify unapportioned gross receipts taxes

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987), does not, as respondent asserts and the Delaware court concluded, Opp. 12-13; Pet. App. 14a, hold that the State where a sale occurs at wholesale may tax an unapportioned share of the seller's gross receipts realized from that sale.

As the petition discusses, Pet. 17-20, the only apportionment question resolved by *Tyler Pipe* was, where manufacturing and wholesaling occur in different States, whether the fact that "the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State" means that a gross receipts tax on wholesaling must be apportioned among both the States where the goods were manufactured and where they were sold. *Tyler Pipe*, 483 U.S. at 251. Wholesaling, *Tyler Pipe* held, is a "separate activity" for taxation purposes. *Id.*

But this Court recognized in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), that gross receipts from even a separate taxed activity (there transportation, here wholesaling) may be earned in more than one State and admonished in *Jefferson Lines*, 514 U.S. at 190, that gross receipts taxes be apportioned among those States.

3. Respondent's reliance on *Standard Pressed Steel* does not obviate the need for this Court's review

Respondent also relies upon *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), although the Supreme Court of Delaware never cited that case. But *Standard Pressed Steel*'s terse discussion of the apportionment of gross receipts has drawn steep criticism and if read as respondent urges, cannot be reconciled with this Court's subsequent apportionment precedents. Indeed, respondent's need to rely upon certain passages of *Standard Press Steel* demonstrates that confusion over this Court's precedents as to how gross receipts taxes are to be treated still exists, even though *Jefferson Lines* subsequently should have resolved that issue.

The entirety of *Standard Pressed Steel*'s discussion of apportionment of a gross receipts tax was that "the tax on the gross receipts from sales made to a local consumer" by an out-of-state manufacturer with limited in-state wholesaling activities was "'apportioned exactly to the activities taxed,' [all] of which are intrastate." *Id.* at 564 (quoting *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 440 (1939)). This discussion has been described as a "puzzling comment" and "a single cryptic phrase [that] left unanswered the question how an 'unapportioned' tax on gross receipts can be 'apportioned exactly' to activities which were only *partially* responsible for their creation." Walter Hellerstein, *State Taxation of*

Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel *and* Colonial Pipeline, 62 Va. L. Rev. 149, 161 (1976) (emphasis added). This statement, as relied upon by respondent, cannot be reconciled with the Court's "insistence" in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938), and reemphasized later in *Jefferson Lines*, "that taxes measured by gross receipts from interstate commerce must be 'fairly apportioned to the commerce carried on within the taxing state.'" Hellerstein, *supra*, at 170 (quoting *Western Live Stock*, 303 U.S. at 256).

The only way to justify *Standard Pressed Steel*'s "stray[ing] from the apportionment principle" is if the Court were "analogiz[ing] gross receipts taxes to retail sales and use taxes." *Id.* at 171-172. But if that is the case, it comes into direct conflict with the Court's holding in *Jefferson Lines*, rejecting the analogy between gross receipts taxes and sales taxes and instead concluding that gross receipts taxes are a form of tax on income that must be apportioned. *Jefferson Lines*, 514 U.S. at 189-190.

C. Respondent Cannot Reconcile The Conflict Among State Courts Over Apportionment Of Gross Receipts Taxes

Respondent misreads the state court rulings described in the petition in an attempt to reconcile those rulings with the decision below. As the petition demonstrates, Pet. 12-16, the Delaware court's

rationale is plainly inconsistent with rulings of six other state courts. Those courts have explained that "[i]n the context of income taxes or taxes on gross receipts, apportionment must take into account the location where the revenue is generated." *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 71 (Colo. 1999); *see also City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495, 498 (Va. 1996) (explaining that because out-of-state facilities add "value * * * to the product" the taxing State cannot tax 100% of the revenue). The court below, by contrast, claims entitlement to tax the full value of the gross receipts from vehicles delivered to Delaware, even though respondent has conceded that significant economic activity generating those receipts—including the sales themselves—occurred outside the State.

Respondent thus is mistaken to suggest that the gross receipts tax at issue in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003), was on the football club's total gross receipts. At issue was the constitutionality of the gross receipts tax imposed on the club's media receipts, and not revenue from other sources. Those media receipts were generated from a single contract for "the sale or transfer of exclusive rights to televise games," *id.* at 119—*i.e.*, a single sale that occurred in a single location. Under the Delaware court's holding, Philadelphia (the place of sale) could have taxed the entirety of the media receipts. But the Supreme Court of Pennsylvania held that the tax must be apportioned based on where the

underlying activity (the football games) took place. *Id.* at 132.

Respondent's attempt to reconcile the Delaware decision with *Southern Pacific Transportation Co. v. Arizona*, 44 P.3d 1006 (Ariz. Ct. App. 2002), also falls short. Although the transportation services there were performed in more than one State, the sales of those services occurred wholly within Arizona, and the goods were delivered in Arizona. Under the Delaware court's rationale, Arizona could have taxed all of the gross receipts from those sales. But the Arizona court read *Jefferson Lines* as requiring the gross receipts tax to be apportioned between Arizona and New Mexico, where the underlying transportation activities took place. *Id.* at 1013-1015 (noting that *Tyler Pipe* and *Standard Pressed Steel* are "doubtful authority in the wake of *Jefferson Lines*").

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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FORD MOTOR COMPANY,
Petitioner,

v.

DELAWARE DIRECTOR OF REVENUE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner ("Ford") is filed on behalf of the Council On State Taxation ("COST") and the National Association of Manufacturers ("NAM").

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

Amici's members' interest in this case is both specific and general. Many *amici* members conduct business in Delaware and pay taxes in the jurisdiction. The decision of the Delaware Supreme Court that an unapportioned gross receipts tax is constitutional raises a risk that Delaware or its localities may each attempt to allocate other types of receipts entirely to their taxing jurisdiction. Such an unconstitutional extension of the State's taxing jurisdiction threatens the fragile balance of many of *amici*'s members' tax liability in multiple states.

On a broader level, the decision adversely affects all *amici* members because unapportioned, unconstitutional local taxes continue to be a problem in other jurisdictions. *Amici* have witnessed a tremendous growth in the application of gross receipts taxes. Gross receipts taxes that are neither apportioned nor fairly apportioned by a state or local taxing jurisdiction can lead to unjust results. Thus, *amici*'s members have a strong interest in the Court mandating that state and local governments fairly apportion gross receipts taxes imposed on the privilege of doing business. Without the Court's guidance, businesses will be subject to an increasing number of unapportioned business taxes, resulting in

multiple taxes with a potential multiplier as high as the number of jurisdictions in which a business is subject to tax. By granting the Petition for Certiorari, this Court can clarify the extent that state and local governments can impose their business activity taxes.

STATEMENT OF THE CASE

The state of Delaware imposes business activity taxes, including a gross receipts tax. Among the activities subject to the gross receipts tax is the wholesaling of goods. The tax on wholesaling is measured by the entire gross receipts received from wholesale sales of goods delivered to locations in the State, regardless of where the actual sales, including title transfer, occur.

Ford's wholesaling activities that ultimately result in the receipt of a vehicle by a Delaware dealer include a multi-step order process, most of which occurs outside the State of Delaware. Ford challenged the validity of the tax, including a Commerce Clause claim that the State's gross receipts tax unduly burdens interstate commerce by failing to fairly apportion the tax to Ford's activities conducted within the State. Finding that the risk of double taxation was a minor constitutional concern, the Delaware Supreme Court ultimately rejected Ford's Commerce Clause claim.

SUMMARY OF ARGUMENT

The Court should grant review in this case because the rule for determining whether a gross receipts tax must be apportioned has created great confusion in state courts-confusion only this Court can resolve. The Delaware Supreme Court's holding that the Commerce Clause does not bar a state from imposing

a gross receipts tax on 100 percent of a taxpayer's gross receipts derived from interstate activities—the vast majority of those activities occurring outside of the State—is but one example of the continued confusion.

As acknowledged by this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), a gross receipts tax that is akin to an income tax is required to be apportioned to reflect the location of the various interstate activities by which it was earned. Conversely, sales taxes need not be apportioned provided they satisfy all other requirements articulated in *Jefferson Lines*. A great deal of confusion continues to surround the application of this distinction to gross receipts taxes-are they more akin to an income tax or a sales tax?

The conflict over whether the imposition of a business activity tax on a taxpayer's unapportioned gross receipts is fairly apportioned is not an issue limited only to Delaware. States and cities across the United States have increasingly adopted alternative tax regimes that differ greatly from traditional income taxes, and State courts around the country are divided on how to properly apportion such taxes. A denial of *certiorari* in this case will only allow the problem to persist and will perpetuate confusion and uncertainty with governmental tax policy makers and the taxpaying business community.

Lastly, in such tough economic times, businesses and States need clear direction from this Court. States facing overwhelming revenue shortfalls must reliably know what business income they may constitutionally tax. Businesses such as Ford, which timely file and pay tax due, should not be subject to double taxation on gross receipts that the Commerce

Clause demands be fairly apportioned. It is time for this Court to provide guidance on this increasingly prevalent issue.

ARGUMENT

I. THIS COURT SHOULD OFFER GUIDANCE ON WHETHER APPORTIONMENT IS REQUIRED FOR GROSS RECEIPTS TAXES THAT ARE NOT TRANSACTIONAL IN NATURE UNDER *JEFFERSON LINES*

The key issue in need of resolution in this case is the application of this Court's clear requirement that income taxes be fairly apportioned. States and localities have repeatedly argued that gross receipts taxes are more akin to sales taxes that need not be apportioned.

In 1977, the Supreme Court adopted a four-part test for determining whether a state or local tax on an interstate business is valid under the Commerce Clause. *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977). In *Complete Auto*, the Court held that a tax is permissible under the Commerce Clause only when the tax is "applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279. It is the second requirement—fair apportionment—that is at issue in this case.

The Supreme Court subsequently further refined the fair apportionment prong of the Commerce Clause analysis. To be fairly apportioned, a tax must be both internally and externally consistent. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

Even before the Court consolidated its disparate Commerce Clause tests in *Complete Auto* and *Goldberg v. Sweet*, the Court was confronted with the question of the constitutionality under a fair apportionment analysis of a tax on the unapportioned gross receipts of a business earning those receipts in multiple jurisdictions. In *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), the State of New York sought to impose an unapportioned gross receipts tax on all the taxpayer's nationwide gross receipts from transportation services, even though 43% of the transportation (measured by mileage) actually took place in New Jersey and Pennsylvania. The Supreme Court held that the tax violated the Commerce Clause because it was not apportioned:

> New York claims the right to tax the gross receipts from transportation which traverses New Jersey and Pennsylvania as well as New York. To say that this commerce is confined to New York is to indulge in pure fiction. To do so, does not eliminate the relation of Pennsylvania and New Jersey to the transactions nor eliminate the benefits which those two States confer upon the portions of the transportation within their borders. Neither their interests nor their responsibilities are evaporated by the verbal device of attributing the entire transportation to New York.

Central Greyhound, 334 U.S. at 660.

Central Greyhound predates the now-classic four-part Commerce Clause test of *Complete Auto* discussed above, under which all state and local taxes are tested. However, *Central Greyhound* remains a pertinent precedent for purposes of testing gross receipts taxes, as can be seen from this Court's decision

in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). There, the Court distinguished the apportionment analysis of a tax on a distinct transaction (such as a sales tax) from a tax on the income from business activity (such as the gross receipts tax imposed by Delaware in this case).

A state imposing a gross receipts tax in the form of a sales tax does not necessitate the same apportionment requirements because the manner in which the tax is imposed and any allowable credits prevents a concern with double taxation. In acknowledging *Central Greyhound* covered the same type of bus services provided by *Jefferson Lines*, the Court in *Jefferson Lines* noted:

> Here, in contrast, the tax falls on the buyer of the services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination.

Jefferson Lines at 190. *See also Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) where the Court looked at New Mexico's gross receipts tax (akin to a sales tax) and stated, "The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

The tax imposed by Delaware, however, is not akin to a sales tax. The State's gross receipts tax is far more analogous to a net income tax, because it taxes the aggregate of all sales in the taxing state at once. Similar to *Central Greyhound*, the gross receipts tax imposed by Delaware is "simply a variety of tax on

income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Jefferson Lines* at 190. The Delaware Supreme Court in its decision below acknowledged in its decision that a State may tax "only that portion of the revenues from interstate activity which reasonably reflect the in-state component of the activity being taxed." *Ford Motor Co. v. Director of Rev.* 963 A.2d 115, 122 (Del. 2008) (citing *Goldberg*, 488 U.S. at 262). However, that court mistakenly upheld the application of the gross receipts tax on 100% of the sales that were physically delivered in Delaware, without providing any credit for the income-producing activities that occurred well before the automobiles crossed the state line.

The Supreme Court of Delaware's analysis is too expedient. It fails to take into account that *Jefferson Lines* reaffirmed the Court's holding in *Central Greyhound* that a gross receipts tax that operates as a variety of an income tax must be apportioned among the jurisdictions in which the activities generating the receipts are performed. Following the *Jefferson Lines* decision, three preeminent state tax scholars and academicians examined the distinction between sales and gross receipts taxes for Commerce Clause purposes, in light of *Jefferson Lines*:

> In distinguishing those levies whose tax base must be divided among the states in order to satisfy the Commerce Clause's fair apportionment requirement from those levies whose tax base may be taxed in full by a single state without offending the Commerce Clause, the Court in *Jefferson Lines* drew a line in the sand between 'sales taxes' and 'gross receipts taxes.' The Court treated the former as a levy on a 'taxable event'

> that occurred, or was deemed to occur, wholly within the state, thereby making apportionment of the base unnecessary. *The Court treated the latter as 'simply a variety of a tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned.'*

W. Hellerstein, M. McIntyre, R. Pomp, "Commerce Clause Restraints on State Taxation After *Jefferson Lines*," 51 Tax L. Rev. 47, 86 (1995). Thus, *Central Greyhound*, as affirmed in *Jefferson Lines*, requires the apportionment of a gross receipts tax among the jurisdictions in which the activities generating the receipts are performed.

In summary, *Jefferson Lines* teaches us a gross receipts tax not operating like a sales tax must be apportioned; *Complete Auto* teaches us that a tax must be fairly apportioned; *Goldberg v. Sweet* teaches us that to be fairly apportioned, a tax must be imposed only on the "portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed"; and *Central Greyhound* teaches us that for a gross receipts tax to reasonably reflect the instate component of the activity being taxed, it must be apportioned among all of the jurisdictions in which the activity giving rise to the tax is performed. Thus, under *Jefferson Lines*, *Complete Auto* and *Central Greyhound*, Delaware's tax on gross receipts must be apportioned, and under *Goldberg v. Sweet*, the apportionment method must account for all of the jurisdictions in which the activity generating the taxed receipts occurs. Hence, the relevant inquiries are: "what is the activity being taxed?" and "where is that activity carried on?"

The Petitioner in this case is being taxed on its activity of wholesaling motor vehicles. The logical next step in the constitutional analysis under *Goldberg v. Sweet* is to locate where that activity is performed. Delaware's position places 100% of the activity in the State while the Petitioner's position would place something less in the State. Thus, the location of the activity being taxed (wholesaling vehicles) is both within and without the State-with much more of the activities to make the sale occurring outside of and not within the State.[1]

Thus, since Delaware taxes 100% of the receipts but only a portion of those receipts are attributable to Delaware, the State is taxing more than the activity which reasonably reflects the instate component of the activity being taxed. Because the State is taxing more than its reasonable share of the activity, its application of its gross receipts tax to 100% of Ford's wholesale receipts is unconstitutional.

II. THE APPORTIONMENT OF BUSINESS ACTIVITY TAXES IS A PERSISTENT AND WIDESPREAD PROBLEM IN NEED OF CLARIFICATION BY THIS COURT

Amici are gravely concerned with the recent growth in the imposition of taxes on unapportioned, interstate gross receipts. With nearly 1,200 separate state and local business activity taxes collected by state and local governments, such taxes have increasingly become the subject of litigation around the

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[1] The Petitioner and Respondent entered into an extensive stipulation of the facts, which found that the "wholesaling process" does not occur only in one State, but occurs in a number of States and eventually leads to the delivery of a wholesale vehicle to an independent dealership in Delaware.

country and will continue to do so unless this Court gives clear guidance. As evidenced in Petitioner's brief, courts around the country are divided on whether the Commerce Clause requires apportionment of gross receipts taxes derived from multistate activity. *Amici* submit this brief to bring to the Court's attention just how varied the rulings on the apportionment of business activity taxes are and how significant the issue is to multijurisdictional taxpayers.

A. The Issue of Unapportioned Gross Receipts Taxes is a Real and Emergent Issue

The number of states and localities that impose business activity taxes based upon unapportioned gross receipts is significant. As noted in Petitioner's brief, the types of these taxes range from newly enacted state-level taxes[2] to a plethora of existing local business activity taxes.

An example of a typical business activity tax based upon gross receipts can be found in Kansas City, Missouri. Kansas City, like many Missouri municipalities, imposes business license taxes on individuals and companies for the privilege of doing business in Kansas City. Kansas City, Mo. Ordinance § 40-61 (1967). The tax is imposed at different rates on different business activities, but in many instances, the tax is imposed based upon a percentage of "gross receipts" from business done in Kansas City. Kansas City, Mo. Ordinance § 40-63 (1967). The Kansas City

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[2] Three states have recently imposed gross receipts taxes: The Ohio Commercial Activities Tax (H.B. 66 2005), The Texas MarginTax (H.B. 3 2005), and the Michigan Business Tax (S.B. 94 2007).

ordinance does not allow the tax to be apportioned to account for any portion of business activity that occurs outside of the city. *Id.*

Bristol, Tennessee offers another example of an ordinance imposing a tax on unapportioned gross receipts. Bristol, like many Tennessee cities, imposes an annual tax on the privilege of doing business within the city. Bristol, Tenn. Ordinance § 66-28 (1980). The tax is based upon a Tennessee statute allowing for the imposition of municipal taxes on the "gross income" of companies doing business in Tennessee cities. Tenn. Code Ann. § 67-4-701, *et seq.* (2007). Like the Kansas City tax, the Bristol tax is not apportioned to account for business activity occurring outside of the city.

Kansas City and Bristol offer but two examples of the 1,200 other taxes imposed on gross receipts. Like Kansas City and Bristol, many of the gross receipts taxes do not allow for the apportionment of receipts where some activity occurs outside of the locality. As demonstrated below, the requirement that these taxes be apportioned has led to litigation in many states to determine whether the lack of apportionment violates the Commerce Clause.

B. Some State Courts Have Held that the Commerce Clause Requires Apportionment of Business Activity Taxes.

When confronted with the issue of fair apportionment of a business activity tax, some state courts have ruled in favor of apportionment, taking the position that to do otherwise would be a Commerce Clause violation. For example, Pennsylvania courts have heard several cases on this issue and generally

rule for an apportionment requirement. In Pennsylvania's seminal case on this issue, *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003) the City of Philadelphia attempted to impose a business activity tax on 100 percent of the taxpayer's media receipts although one-half of the games were telecast from venues outside of the city. The Supreme Court of Pennsylvania held that the City of Philadelphia could only impose a business activity tax on revenue generated from games played and broadcast from within Philadelphia, and not media receipts generated from away games. *Id.* at 135. Because the City attempted to apply the tax to all of the receipts, the business activity tax, as applied, violated the Commerce Clause because it failed the external consistency prong of the fair apportionment test. *Id.* at 135.

In *Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004) the Pennsylvania Supreme Court reached a similar result when it held that a business activity tax imposed on 100 percent of a taxpayer's gross receipts from in-state and out-of-state activity violated the Commerce Clause because the vast majority of the company's business took place out-of-state. *Id.* at 799. In *Northwood Construction*, the taxpayer maintained its principal place of business in the Township of Upper Moreland, yet its primary business activities were conducted throughout Pennsylvania, as well as in three other states. The Township attempted to impose its business activity tax on all of the taxpayer's out-of-state receipts. Utilizing this Court's tests in *Complete Auto* and *Goldberg*, the court ruled that although a taxing jurisdiction may impose a business activity tax on receipts from out-of-state work where the taxpayer maintains a base of operations within the municipal-

ity, such treatment is unconstitutional where most of the taxpayer's business activity is conducted outside of the state. *Id.* at 799.

California courts have also discussed this issue. In *City of Los Angeles v. Shell Oil Co.*, 480 P.2d 953 (Ca. 1971) the Supreme Court of California held that only gross receipts directly attributable to selling activities carried on in the City were taxable. In holding that the application of a business activity tax exceeds the City's constitutional powers, the Supreme Court of California stated that the City "refuses to take cognizance of . . . [substantial] out-of-city elements in the measure of its tax—and accordingly purports to tax the total gross receipts derived from the sales in question—solely because the goods are shipped from the City. Such an application . . . is violative of . . . constitutional principles." *Id.* at 966. *See also General Motors Corporation v. City of Los Angeles*, 486 P.2d 163, 173 (Ca. 1971) (stating that the inclusion of unapportioned gross receipts within the tax base results in the taxation of significant extraterritorial values where substantial elements of the sale process which produces such receipts takes place outside the City); *Volkswagen Pacific, Inc. v. City of Los Angeles*, 496 P.2d 1237, 1245 (Cal. 1972) (Court barred assessment of business activity taxes where the city did not apportion the tax to account for selling activity outside the city limits).

Missouri courts have also held that the application of a business activity tax to unapportioned gross receipts is unconstitutional. In *General Motors Corp. v. City of Kansas City*, 1993 Mo. App. LEXIS 1985 (Mo. Ct. App. 1993), the taxpayer operated an automobile assembly facility in Kansas City. Despite the fact that the greatest percentage of the parts

used to assemble the automobiles were manufactured outside of Kansas City, the City attempted to assess its business activity tax upon the total value of cars manufactured in Kansas City. The Court of Appeals of Missouri, Western District, held that the city's business activity tax, as applied, was unconstitutional because the tax was not limited in its application to manufacturing that occurred within the city. *Id.* at 26. A similar result was reached in a more recent Missouri case, *Ford Motor Co. v. City of Hazelwood*, No. 02CC-002296 Slip Op. (St. Louis County Cir. Ct., Mo. 2003), where the St. Louis County Circuit Court held that a business activity tax imposed upon unapportioned gross receipts from vehicles assembled in the city of St. Louis was unconstitutional as applied. *Id.* At 9-13.

In *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996), the Supreme Court of Virginia struck down the application of a business activity tax to unapportioned revenues as unconstitutional. There, the taxpayer maintained its corporate headquarters in Winchester, but operated 24 facilities in 13 different states-none of which were located in the city. Winchester attempted to impose its business activity tax on 100 percent of the taxpayer's gross receipts, arguing that since the taxpayer is a highly centralized, unitary business all of its gross receipts were in some way attributable to the headquarters office. The Supreme Court of Virginia rejected this argument stating that the imposition of the tax was invalid because it was not apportioned as required by the Commerce Clause. The court reasoned that given the number of facilities and operations outside of the taxing jurisdiction, the value added by the taxpayer's operations within the City

could not possibly produce 100 percent of the revenues. *Id.* at 498.

In *KMS Financial Services, Inc. v. City of Seattle*, 146 P.3d 1195 (Wash. Ct. App. 2006), the Court of Appeals of Washington took the position that "seeking to tax income generated by extraterritorial activities . . . exceeds federal and state constitutional limits." *Id.* at 1198. In *KMS*, the taxpayer was a Washington corporation based solely in Seattle. The taxpayer had nearly 300 registered representatives who worked from 210 business locations in nine western states, including Washington. The City of Seattle imposed its business activity tax on all commissions received at the taxpayer's Seattle office regardless of where the registered representative who generated the commission was based. The Court of Appeals of Washington held that attributing the entire proceeds of taxpayer's registered agent to the city merely because that was the taxpayer's sole office violated the external consistency requirement of fair apportionment, and thus violated the Commerce Clause. *Id.* at 1206.

In addition to the aforementioned cases, other state court decisions have sided with the position that federal Commerce Clause jurisprudence requires the apportionment of multistate gross receipts used to determine a taxpayer's liability for a business activity tax. *See, e.g. Southern Pacific Transp. Co. v. Arizona*, 44 P.3d 1006, 1013, 1017 (Ariz. App. 2002) (stating that a business activity tax on an interstate transaction "will violate the Commerce Clause in the absence of fair apportionment" and holding that a business activity tax could not be constitutionally applied to a taxpayer's railroad gross receipts from transporting goods between the taxing jurisdiction and other

points in the state where a portion of the journey occurred in another state); *Northwest Energetic Services, LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (Cal. Ct. App. 2008) (holding that a business activity tax was required to be fairly apportioned); *General Motors Corp. v. City and County of Denver*, 990 P.2d 59, 71 (Colo. 1999) (acknowledging that a business activity tax must be fairly apportioned and "may only be imposed on interstate activity that 'reasonably reflects the in-state component of the activity being taxed'" (citing *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989))); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991) (where an assessment under Michigan's business activity tax, which is levied based upon a three-factor apportionment formula, was at issue).

C. Other State Courts Have Held that the Commerce Clause Does Not Require Apportionment of Business Activity Taxes.

Some state courts have interpreted the Commerce Clause as not requiring the apportionment of business activity taxes. A Delaware Superior Court upheld the imposition of a business activity tax on unapportioned gross receipts based upon the magnitude of the taxpayer's operations in the state. In *Saudi Refining, Inc. v. Director of Revenue*, 715 A.2d 89 (Del. Super. 1998), the taxpayer was a Delaware corporation with its principal place of business in another state. Despite the fact that the only sales the taxpayer made in Delaware were to a single Delaware corporation, the state imposed its business activity tax on the taxpayer's gross receipts attributable to sales of tangible personal property physically delivered in Delaware. The court found

that the magnitude of the goods purchased and the length of time the goods were within the state created sufficient nexus to bring the taxpayer within the purview of the tax. *Id.* at 92.

Further, other state courts have taken the position that the Commerce Clause does not require the apportionment of a business activity tax imposed on gross receipts derived from activity within and without the taxing jurisdiction. *See e.g. Ramsay Travel, Inc. v. Kondo*, 495 P.2d 1172, 1176 (Haw. 1972) (stating that a tax on 100 percent of commission income received by taxpayer from sales derived within and without the state did not contravene the Commerce Clause); *Ford Motor Co. v. City of Seattle*, 156 P.3d 185 (Wash. 2007) *cert denied* 128 S. Ct. 1224 (2008) (holding that a local business activity tax could be imposed on wholesale activity that occurred partially outside of the locality). These decisions are counter to the clear weight of authority and should not be allowed to stand.

CONCLUSION

In conclusion, the State's imposition of its Business Privilege Tax on 100 percent of Ford's wholesaling receipts is unconstitutional because the receipts arose from activities both within and without the state of Delaware. *Amici* respectfully requests this Court to accept the taxpayer's Petition to clarify this issue of national importance.

Respectfully submitted.

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